

16 C.J.S. Constitutional Law § 175

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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3. Standing of Particular Types of Persons

a. In General

§ 175. Creditors

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  680

A creditor may not attack as unconstitutional a statute which does not affect his or her rights against the debtor.

A creditor may not attack as unconstitutional a statute which does not in any way affect the creditor's rights against his or her debtor.¹ A creditor may, however, urge the invalidity of an action which does affect his or her rights as a creditor,² on the ground that it impairs the validity of his or her obligation³ or affects the ability of his or her debtor to pay.⁴

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Footnotes

¹ U.S.—[Kuehner v. Irving Trust Co.](#), 299 U.S. 445, 57 S. Ct. 298, 81 L. Ed. 340 (1937).
S.D.—[In re Gooder's Estate](#), 69 S.D. 242, 9 N.W.2d 143 (1943).

² U.S.—[Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va.](#), 300 U.S. 440, 57 S. Ct. 556, 81 L. Ed. 736, 112 A.L.R. 1455 (1937); [Vale v. Gary Nat. Bank](#), 406 F.2d 39 (7th Cir. 1969).

Necessaries doctrine

The common-law necessities doctrine creates an obligation directly between a husband and a creditor; accordingly, when a creditor seeks payment of necessary expenses from the wife and an equal protection challenge to the necessities doctrine arises, the creditor is an appropriate party to assert the husband's rights. Vt.—[Medical Center Hosp. of Vermont v. Lorrain](#), 165 Vt. 12, 675 A.2d 1326 (1996).

Garnishment

A judgment creditor seeking to garnish the wages of a judgment debtor's wife was injured by, and had standing to challenge the constitutionality of, a statute setting forth an execution exemption in favor of married women, by which a married woman's property is exempt from execution against her husband, even though the judgment creditor was not a member of the class unfairly burdened by the statute; application of the statute could apply to prevent the judgment creditor from garnishing the wife's wages in order to collect on the judgment.

Idaho—[Credit Bureau of Eastern Idaho, Inc. v. Lecheminant](#), 149 Idaho 467, 235 P.3d 1188 (2010).

3 La.—[State ex rel. Parish of Ouachita Bd. of School Directors v. City of Monroe](#), 132 La. 82, 60 So. 1025 (1913).

4 Fla.—[State ex rel. Mittendorf v. Hoy](#), 112 Fla. 526, 151 So. 1 (1933).

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§ 176. Federal and state governments

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The federal government may assert the inconsistency with the Federal Constitution of a statute not of its own making, and a state may question the validity of an enactment of its own legislature when it is prejudicially affected by the feature of which it complains.

The federal government, when confronted by a statute not of its own making, may, like any other litigant, assert the statute's inconsistency with the Federal Constitution.¹

While a state may not question the validity of an enactment of its own legislature when it is not prejudicially affected by the provision complained of,² it may do so when it is prejudicially affected.³ A state may also challenge the constitutionality of a federal⁴ or state⁵ statute affecting its rights.

A state, as *parens patriae*, may not assert a violation of a federal constitutional right on behalf of its citizens.⁶

A state has standing to object to a defendant's discriminatory use of peremptory challenges under state and federal equal protection clauses.⁷

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Footnotes

- 1 U.S.—[Marquardt Corp. v. Weber County, Utah](#), 360 F.2d 168 (10th Cir. 1966).
- 2 Conn.—[Carroll v. Socony-Vacuum Oil Co.](#), 136 Conn. 49, 68 A.2d 299 (1949).
- Idaho—[State ex rel. Nielson v. City of Gooding](#), 75 Idaho 36, 266 P.2d 655 (1953).
- La.—[State v. Foy](#), 401 So. 2d 948 (La. 1981).
- Mo.—[Missouri Division of Employment Sec. v. Labor and Indus. Relations Commission](#), 620 S.W.2d 36 (Mo. Ct. App. W.D. 1981).

Private resolve

Where a state had no constitutional rights that would be affected by the operation of a private resolve waiving the State's sovereign immunity in a negligence action by a prisoner, ordinary rules of standing precluded it from challenging the validity of the resolve.

Me.—[Brann v. State](#), 424 A.2d 699 (Me. 1981).

- 3 Cal.—[People v. Building Maintenance Contractors' Ass'n](#), 41 Cal. 2d 719, 264 P.2d 31 (1953).

State constitutional provision

State legislators were not required to first pass a law purporting to independently increase taxes in order to allege an injury-in-fact to confer Article III standing in their action challenging the constitutionality of the Taxpayer's Bill of Rights (TABOR), which was adopted by voter initiative and which amended the Colorado constitution to prohibit the state legislature from increasing taxes or imposing new taxes without voter approval, since passing such a law would have been futile.

U.S.—[Kerr v. Hickenlooper](#), 744 F.3d 1156 (10th Cir. 2014).

- 4 U.S.—[Oklahoma v. U.S. Civil Service Com'n](#), 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947).

- 5 U.S.—[Wyoming v. Oklahoma](#), 502 U.S. 437, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992).

- 6 Kan.—[State ex rel. State Bd. of Healing Arts v. Beyrle](#), 269 Kan. 616, 7 P.3d 1194 (2000).

U.S.—[State of S.C. v. Katzenbach](#), 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (abrogated on other grounds by, [Shelby County, Ala. v. Holder](#), 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013)).

Equal protection

Va.—[Esper Bonding Co. v. Com.](#), 222 Va. 595, 283 S.E.2d 185 (1981).

State as cause of discrimination

U.S.—[Arkansas-Best Freight System, Inc. v. Cochran](#), 546 F. Supp. 904 (M.D. Tenn. 1981).

- 7 Fla.—[State v. Aldret](#), 606 So. 2d 1156 (Fla. 1992).

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§ 177. Political subdivisions of state

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West's Key Number Digest

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With some exceptions, a political subdivision of a state may not challenge the constitutionality of a state statute or governmental activity.

It is a general rule that political subdivisions, as creatures of the state, lack standing to question the constitutionality of state statutes or governmental activity,¹ particularly where it relates to governmental powers and duties.² This rule has been applied to counties;³ cities, towns, and townships;⁴ school districts;⁵ and agencies of the State.⁶ The rule barring political subdivisions of a state from challenging state statutes directing the performance of their duties exists so that courts do not unnecessarily intrude into matters which are more properly committed to resolution in another branch of government and is based on a belief that political subdivisions of the state exist only for the convenient administration of the state government and are created to carry out the will of the state.⁷

The general rule that a political subdivision or agency of the State lacks standing to challenge a state statute is subject to exceptions⁸ as where the issue is one of substantial public interest,⁹ where the subdivision alleges that compliance with the challenged statute will force the violation of a constitutional proscription,¹⁰ or where the political subdivision is granted express or implied statutory or constitutional authority to file a civil action against the State.¹¹

In some circumstances, political subdivisions and other subordinate governmental entities have been permitted to bring constitutional challenges to state statutes or actions which affect them adversely¹² as by subjecting it to financial risk¹³ or invalidating an ordinance.¹⁴ However, in the absence of a showing of an adverse effect upon it, a political subdivision or agency of the State cannot challenge a legislative enactment or governmental action.¹⁵

A political subdivision of a state may not assert a violation of a federal constitutional right on behalf of the state's citizens.¹⁶

A subordinate political entity, such as a county, may not challenge a state's actions under the Contract Clause.¹⁷

Entity not acting in sovereign capacity.

In order to constitute a "person" with standing to challenge the constitutionality of a state statute, a sovereign entity involved must be acting not in its sovereign capacity, but rather, it must be engaging in commercial and business transactions such as other persons, natural or artificial, are accustomed to conduct.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

New York follows the traditional capacity-to-sue rule, which states that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. [In re World Trade Center Lower Manhattan Disaster Site Litigation, 846 F.3d 58 \(2d Cir. 2017\)](#).

Budgetary uncertainty of type threatened by enforcement provision of executive order purporting to prevent "sanctuary jurisdictions" from receiving federal grants was sufficiently concrete injury, and thus counties had Article III standing to challenge constitutionality of executive order; potential loss of all federal grants created contingent liability large enough to have real and concrete impacts on counties' ability to budget and plan for the future, sudden and unanticipated cut in federal funds would have substantially increased injury to counties by forcing them to make drastic cuts to absorb the loss of funds, and potential loss of funds impacted counties' potential borrowing power and financial strength. [U.S. Const. art. 3, § 2, cl. 1; 8 U.S.C.A. § 1373; Executive Order No. 13,768, § 9\(a\), January 25, 2017, 82 Fed. Reg. 8799, 2017 WL 388889. County of Santa Clara v. Trump, 275 F. Supp. 3d 1196 \(N.D. Cal. 2017\)](#).

[END OF SUPPLEMENT]

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Footnotes

1

Iowa—[Exira Community School Dist. v. State, 512 N.W.2d 787, 89 Ed. Law Rep. 965 \(Iowa 1994\)](#).

Mich.—[Mayor of Detroit v. Arms Technology, Inc., 258 Mich. App. 48, 669 N.W.2d 845 \(2003\)](#).

Neb.—[Middle Niobrara Natural Resources Dist. v. Department of Nat. Resources](#), 281 Neb. 634, 799 N.W.2d 305 (2011).

N.Y.—[Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith](#), 21 N.Y.3d 309, 970 N.Y.S.2d 724, 992 N.E.2d 1067 (2013).

Ohio—[State ex rel. Zupancic v. Limbach](#), 58 Ohio St. 3d 130, 568 N.E.2d 1206 (1991).

2 Colo.—[City of Greenwood Village v. Petitioners for Proposed City of Centennial](#), 3 P.3d 427 (Colo. 2000).

La.—[Morial v. Smith & Wesson Corp.](#), 785 So. 2d 1 (La. 2001).

Minn.—[Metropolitan Sports Facilities Com'n v. County of Hennepin](#), 451 N.W.2d 319 (Minn. 1990).

3 Colo.—[Mesa Verde Co. v. Montezuma County Bd. of Equalization](#), 831 P.2d 482 (Colo. 1992).

Minn.—[Metropolitan Sports Facilities Com'n v. County of Hennepin](#), 451 N.W.2d 319 (Minn. 1990).

4 Wis.—[Brown County v. Department of Health and Social Services](#), 103 Wis. 2d 37, 307 N.W.2d 247 (1981).

U.S.—[City of South Lake Tahoe v. California Tahoe Regional Planning Agency](#), 625 F.2d 231 (9th Cir. 1980); [City of New York v. Milhelm Attea & Bros., Inc.](#), 550 F. Supp. 2d 332, 44 A.L.R. Fed. 2d 729 (E.D. N.Y. 2008) (applying New York law).

Ark.—[City of Cave Springs v. City of Rogers](#), 343 Ark. 652, 37 S.W.3d 607 (2001).

La.—[Morial v. Smith & Wesson Corp.](#), 785 So. 2d 1 (La. 2001).

Mich.—[DeWitt Tp. v. Clinton County](#), 113 Mich. App. 709, 319 N.W.2d 2 (1982).

N.Y.—[New York State Ass'n of Small City School Districts, Inc. v. State](#), 42 A.D.3d 648, 840 N.Y.S.2d 179, 222 Ed. Law Rep. 830 (3d Dep't 2007).

Wis.—[Town of Somerset v. Wisconsin Dept. of Natural Resources](#), 2011 WI App 55, 332 Wis. 2d 777, 798 N.W.2d 282 (Ct. App. 2011).

5 U.S.—[Northwestern School Dist. v. Pittenger](#), 397 F. Supp. 975 (W.D. Pa. 1975).

Iowa—[Exira Community School Dist. v. State](#), 512 N.W.2d 787, 89 Ed. Law Rep. 965 (Iowa 1994).

6 Mass.—[Massachusetts Bay Transp. Authority v. Auditor of Com.](#), 430 Mass. 783, 724 N.E.2d 288 (2000).

Tex.—[Parker County v. Weatherford Independent School Dist.](#), 775 S.W.2d 881, 55 Ed. Law Rep. 1223 (Tex. App. Fort Worth 1989), writ granted, (Mar. 21, 1990) and judgment rev'd on other grounds, 794 S.W.2d 33, 64 Ed. Law Rep. 597 (Tex. 1990).

Board of education

Ill.—[Cronin v. Lindberg](#), 66 Ill. 2d 47, 4 Ill. Dec. 424, 360 N.E.2d 360 (1976).

Insurance insolvency pool

Ga.—[Georgia Insurers Insolvency Pool v. Hulsey Environmental Services, Inc.](#), 293 Ga. 504, 748 S.E.2d 380 (2013).

Park and planning commission

Md.—[Maryland-National Capital Park and Planning Com'n v. Anderson](#), 179 Md. App. 613, 947 A.2d 149 (2008).

Subordinate agencies

Subordinate state agencies may not challenge the actions of superior state agencies.

Colo.—[City of Greenwood Village v. Petitioners for Proposed City of Centennial](#), 3 P.3d 427 (Colo. 2000).

Colo.—[City of Greenwood Village v. Petitioners for Proposed City of Centennial](#), 3 P.3d 427 (Colo. 2000).

Judicial and political relationship between entities and state

A limitation on the capacity of municipalities, under New York law, to mount constitutional challenges to acts of the state and state legislation flows from judicial recognition of the judicial as well as political relationship between those entities and the state.

U.S.—[City of New York v. Milhelm Attea & Bros., Inc.](#), 550 F. Supp. 2d 332, 44 A.L.R. Fed. 2d 729 (E.D. N.Y. 2008).

8 N.Y.—[Riley v. Monroe County](#), 43 N.Y.2d 144, 400 N.Y.S.2d 801, 371 N.E.2d 520 (1977).

9 Minn.—[Metropolitan Sports Facilities Com'n v. County of Hennepin](#), 451 N.W.2d 319 (Minn. 1990).

Wis.—[State v. City of Oak Creek](#), 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526 (2000).

Exception inapplicable

A town lacked standing to challenge the constitutionality of a statute requiring the Department of Natural Resources to pay a withdrawal tax, for land withdrawn from the managed forest land program, to each municipality in which is located the land to which payment applies; the exception to the general rule that municipalities lack standing to challenge the constitutionality of statutes for cases of great public concern

was inapplicable since the case involved a state agency and two municipalities, but no private litigants, and the great public concern exception required the presence of a private litigant.

Wis.—*Town of Somerset v. Wisconsin Dept. of Natural Resources*, 2011 WI App 55, 332 Wis. 2d 777, 798 N.W.2d 282 (Ct. App. 2011).

10 N.Y.—*Seymour v. Holcomb*, 7 Misc. 3d 530, 790 N.Y.S.2d 858 (Sup 2005), aff'd, 26 A.D.3d 661, 811 N.Y.S.2d 134 (3d Dep't 2006), order aff'd, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1 (2006).

11 Colo.—*Romer v. Fountain Sanitation Dist.*, 898 P.2d 37 (Colo. 1995).

Ga.—*Jekyll Island-State Park Authority v. Jekyll Island Citizens Ass'n*, 266 Ga. 152, 464 S.E.2d 808 (1996).

Mich.—*Mayor of Detroit v. Arms Technology, Inc.*, 258 Mich. App. 48, 669 N.W.2d 845 (2003).

12 Alaska—*Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n*, 839 P.2d 1080 (Alaska 1992).

Kan.—*Board of Educ. of Unified School Dist. No. 443, Ford County v. Kansas State Bd. of Educ.*, 266 Kan. 75, 966 P.2d 68, 130 Ed. Law Rep. 308 (1998).

N.C.—*Town of Spruce Pine v. Avery County*, 346 N.C. 787, 488 S.E.2d 144 (1997).

Wyo.—*Board of County Com'rs v. Geringer*, 941 P.2d 742 (Wyo. 1997).

Colorable interest and adverse effect

Miss.—*City of Starkville v. 4-County Elec. Power Ass'n*, 909 So. 2d 1094 (Miss. 2005).

Where subdivision not accepting benefits under statute

N.C.—*Town of Spruce Pine v. Avery County*, 346 N.C. 787, 488 S.E.2d 144 (1997).

Withholding of revenue

N.Y.—*County of Rensselaer v. Regan*, 80 N.Y.2d 988, 592 N.Y.S.2d 646, 607 N.E.2d 793 (1992).

Nonconstitutional case

A subdivision may challenge the constitutionality of a statute by which it is adversely affected if the subdivision is properly in court on a nonconstitutional question.

Conn.—*Bergeson v. City of New London*, 269 Conn. 763, 850 A.2d 184 (2004).

Home Rule Amendment

A municipality has standing to raise a claim that a legislative enactment violates the Home Rule Amendment, which restricts the legislature's power to act in relation to cities and towns.

Mass.—*Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School Dist.*, 461 Mass. 366, 961 N.E.2d 83, 276 Ed. Law Rep. 411 (2012).

N.Y.—*Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith*, 21 N.Y.3d 309, 970 N.Y.S.2d 724, 992 N.E.2d 1067 (2013).

Expenditure of public funds

Political subdivisions have standing to challenge state action that adversely affects them or requires them to expend public funds.

Neb.—*Middle Niobrara Natural Resources Dist. v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

13 Pa.—*City of Philadelphia v. Schweiker*, 579 Pa. 591, 858 A.2d 75 (2004).

14 Ind.—*Indiana Dept. of Natural Resources v. Newton County*, 802 N.E.2d 430 (Ind. 2004).

15 U.S.—*San Diego Regional Employment and Training Consortium v. Marshall*, 633 F.2d 862 (9th Cir. 1980).

Me.—*Town of Acton v. McGary*, 356 A.2d 700 (Me. 1976).

N.C.—*Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974).

16 Wash.—*King County v. Port of Seattle*, 37 Wash. 2d 338, 223 P.2d 834 (1950).

Nev.—*Clark County v. City of Las Vegas*, 94 Nev. 74, 574 P.2d 1013 (1978).

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18 Mass.—*Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School Dist.*, 461 Mass. 366, 961 N.E.2d 83, 276 Ed. Law Rep. 411 (2012).

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Ordinarily, the mere interest of a public official, as such, is not sufficient to entitle him or her to question the validity of a statute or other governmental action, and he or she may do so only where he or she shows that his or her rights of person or property are adversely affected.

As a general rule, a public official whose rights are not adversely and injuriously affected by the operation of a statute or ordinance, such as one compelling the performance of a duty, or the particular feature of it complained of, or by other governmental action, may not raise the question of its constitutionality.¹ And in this regard, while ordinarily, the mere interest of a public official, as such, is not sufficient to entitle him or her to question the validity of a statute or assert a violation of constitutional rights,² an officer may raise such a question if he or she shows that his or her personal or property rights are adversely affected by the operation of the statute or by reason of other governmental action.³ Such a showing is sufficient to sustain standing with respect to such matters⁴ or with regard to the provisions of a state constitution.⁵

Standing has also been found where specific powers unique to an officer's functions under a constitution are interfered with or diminished⁶ or where public interests or public rights are involved.⁷ The members of a government board, the constitutionality of which is challenged in an action, have standing even after their duties are completed to continue the action when the lawfulness of their work rides on the outcome of the proceeding.⁸ A public official may also have standing as a taxpayer to bring a constitutional attack on governmental action.⁹

A state official has sufficient interest and standing to raise constitutional issues in a case which is properly in court on nonconstitutional questions,¹⁰ and an exception to the general rules of standing may be made where an official has authority to raise other constitutional issues arising in the case.¹¹

In a proper case, an attorney general¹² or a prosecuting¹³ or county¹⁴ attorney may question the constitutionality of a statute, and a comptroller may question the constitutionality of an appropriation bill.¹⁵ However, such officer may not maintain an action to test the constitutionality of a statute where his or her personal or property rights are not adversely affected by the statute¹⁶ or where he or she does not represent a person whose rights could not otherwise be effectively vindicated.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Chief judge of judicial district suffered specific, personal, and cognizable injury, and therefore had standing to challenge constitutionality of house bill amending statute governing duties of chief judge of judicial districts, where house bill required judge, along with the other judges in the judicial district, to develop and adopt a procedure for electing among themselves a chief judge. West's K.S.A. 20-329, 60-1704. *Solomon v. State*, 364 P.3d 536 (Kan. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982).
Ariz.—*Jay v. Kreigh*, 110 Ariz. 299, 518 P.2d 122 (1974).
Colo.—*Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374 (Colo. 1980).
Fla.—*Department of Educ. v. Lewis*, 416 So. 2d 455, 5 Ed. Law Rep. 681 (Fla. 1982).
Ill.—*Cronin v. Lindberg*, 66 Ill. 2d 47, 4 Ill. Dec. 424, 360 N.E.2d 360 (1976).
Mass.—*Finance Commission of Boston v. Mayor of Boston*, 370 Mass. 693, 351 N.E.2d 517 (1976).
Minn.—*Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366 (Minn. 1977).
Neb.—*Middle Niobrara Natural Resources Dist. v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).
Pa.—*City of Philadelphia v. Schweiker*, 579 Pa. 591, 858 A.2d 75 (2004).
S.C.—*Douglas v. McLeod*, 277 S.C. 76, 282 S.E.2d 604 (1981).
Tenn.—*Bates v. Tennessee Consol. Retirement System ex rel. Ashley*, 563 S.W.2d 192 (Tenn. Ct. App. 1977).
Tex.—*Lewis v. El Paso County*, 571 S.W.2d 382 (Tex. Civ. App. El Paso 1978).

City council members

City council members lacked standing in their capacity as legislators to bring a federal-court suit alleging that the city solicitor had exceeded his authority by entering into a settlement agreement on the city's behalf in billboard operators' First Amendment challenge to the council's outdoor advertising regulations; the council

members did not claim that they had been deprived of meaningful participation in the legislative process or had been unable to exercise their rights as legislators but only that the city had failed to enforce their ordinances and thus stated a generalized complaint about the functioning of city government.

U.S.—[Goode v. City of Philadelphia](#), 539 F.3d 311 (3d Cir. 2008)

First Amendment challenge

A public official may not challenge the constitutionality of a statute on First Amendment grounds under the overbreadth doctrine.

U.S.—[Clements v. Fashing](#), 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982)

As to the overbreadth doctrine, see § 169.

2

U.S.—[Columbus & G. Ry. Co. v. Miller](#), 283 U.S. 96, 51 S. Ct. 392, 75 L. Ed. 861 (1931).

Mass.—[Penal Institutions Com'r for Suffolk County v. Commissioner of Correction](#), 382 Mass. 527, 416 N.E.2d 958 (1981).

N.Y.—[New York State Ass'n of Chiefs of Police v. Municipal Police Training Council \(MPTC\) of New York State](#), 82 Misc. 2d 289, 368 N.Y.S.2d 438 (Sup 1975).

Insufficient personal stake

Individual members of Congress did not have a sufficient personal stake in the dispute, and did not allege sufficiently concrete injury, to establish Article III standing to maintain a suit challenging the constitutionality of the Line Item Veto Act; the plaintiffs alleged no injury to themselves as individuals but rather alleged a wholly abstract and widely dispersed institutional injury from the dilution of legislative power, and the plaintiffs had not been authorized to represent their respective Houses of Congress in the action.

U.S.—[Raines v. Byrd](#), 521 U.S. 811, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997).

3

Tenn.—[Norman v. Tennessee State Bd. of Claims](#), 533 S.W.2d 719 (Tenn. 1975).

State legislator

A state legislator did not have standing to challenge the constitutionality of a state statute, absent an allegation that the statute had a particular adverse effect on him personally that was distinct from that suffered by other state citizens.

U.S.—[Common Cause of Pennsylvania v. Pennsylvania](#), 447 F. Supp. 2d 415 (M.D. Pa. 2006), aff'd, 558 F.3d 249 (3d Cir. 2009).

4

Cal.—[Senate of State of Cal. v. Jones](#), 21 Cal. 4th 1142, 90 Cal. Rptr. 2d 810, 988 P.2d 1089 (1999).

Ill.—[People ex rel. Hopf v. Barger](#), 30 Ill. App. 3d 525, 332 N.E.2d 649 (2d Dist. 1975).

Md.—[State's Attorney of Baltimore City v. City of Baltimore](#), 274 Md. 597, 337 A.2d 92 (1975).

Nev.—[Tam v. Colton](#), 94 Nev. 453, 581 P.2d 447 (1978).

N.Y.—[Board of Ed. of Belmont Central School Dist. v. Gootnick](#), 49 N.Y.2d 683, 427 N.Y.S.2d 777, 404 N.E.2d 1318 (1980).

Pa.—[Snider v. Shapp](#), 45 Pa. Commw. 337, 405 A.2d 602 (1979).

5

U.S.—[Dyer v. Blair](#), 390 F. Supp. 1291 (N.D. Ill. 1975).

6

Miss.—[Fordice v. Bryan](#), 651 So. 2d 998 (Miss. 1995) (legislators had standing to sue the governor for an alleged unconstitutional exercise of partial veto powers where they asserted a colorable interest in the subject matter of the litigation, and their votes on bills were adversely affected by the governor's partial vetoes).

Deprivation of opportunity to have bill considered on merits

Colo.—[Grossman v. Dean](#), 80 P.3d 952 (Colo. App. 2003).

7

Abolition of office

Ky.—[Holt v. Clements](#), 265 Ky. 546, 97 S.W.2d 397 (1936).

Alaska—[Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n](#), 839 P.2d 1080 (Alaska 1992).

Ark.—[Federal Exp. Corp. v. Skelton](#), 265 Ark. 187, 578 S.W.2d 1 (1979).

Md.—[City of Baltimore v. Concord Baptist Church, Inc.](#), 257 Md. 132, 262 A.2d 755 (1970).

Me.—[Pembroke School Committee v. Veder](#), 2002 ME 161, 809 A.2d 624, 171 Ed. Law Rep. 864 (Me. 2002).

Minn.—[Village of Burnsville v. Onischuk](#), 301 Minn. 137, 222 N.W.2d 523 (1974).

Pa.—[Harney v. Russo](#), 435 Pa. 183, 255 A.2d 560 (1969).

S.C.—[Thompson v. South Carolina Commission on Alcohol and Drug Abuse](#), 267 S.C. 463, 229 S.E.2d 718, 85 A.L.R.3d 692 (1976).

Effect on role and operation of legislative branch

- Cal.—[Senate of State of Cal. v. Jones](#), 21 Cal. 4th 1142, 90 Cal. Rptr. 2d 810, 988 P.2d 1089 (1999).
Mo.—[Millsap v. Quinn](#), 785 S.W.2d 82 (Mo. 1990).
Fla.—[Florida House of Representatives v. Martinez](#), 555 So. 2d 839, 58 Ed. Law Rep. 828 (Fla. 1990).
As to taxpayer standing, generally, see § 171.
Conn.—[Tough v. Ives](#), 162 Conn. 274, 294 A.2d 67 (1972) (issues arising in a tort claim against the State).
Colo.—[Board of County Com'rs of Boulder County v. Fifty-First General Assembly of State of Colo.](#), 198 Colo. 302, 599 P.2d 887 (1979).
Neb.—[Prendergast v. Nelson](#), 199 Neb. 97, 256 N.W.2d 657 (1977).
U.S.—[First Federal Savings & Loan Ass'n of Wisconsin v. Loomis](#), 97 F.2d 831, 121 A.L.R. 99 (C.C.A. 7th Cir. 1938).
Fla.—[Copeland v. State](#), 76 So. 2d 137 (Fla. 1954).
La.—[State ex rel. Porterie v. Walmsley](#), 181 La. 597, 160 So. 91 (1935).
La.—[State v. Washburn](#), 177 La. 27, 147 So. 489 (1933).
Kan.—[State ex rel. White v. Board of Com'rs of Wyandotte County](#), 140 Kan. 744, 39 P.2d 286 (1934).
Wash.—[State ex rel. Evans v. Brotherhood of Friends](#), 41 Wash. 2d 133, 247 P.2d 787 (1952).

During representation of state

The county attorney's authority to act on behalf of either the county or the State is derived from the legislature, and he or she therefore may not challenge the constitutionality of legislative acts in court while representing the interests of the State.

- Iowa—[In re A.W.](#), 741 N.W.2d 793 (Iowa 2007).
Fla.—[Department of Educ. v. Lewis](#), 416 So. 2d 455, 5 Ed. Law Rep. 681 (Fla. 1982).
U.S.—[Baxley v. Rutland](#), 409 F. Supp. 1249 (M.D. Ala. 1976).
Fla.—[State ex rel. Watson v. Kirkman](#), 158 Fla. 11, 27 So. 2d 610 (1946).
Wash.—[State ex rel. Schillberg v. Morris](#), 85 Wash. 2d 382, 536 P.2d 1 (1975); [State v. Jones](#), 84 Wash. 2d 823, 529 P.2d 1040 (1974).

16 C.J.S. Constitutional Law § 179

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

3. Standing of Particular Types of Persons

b. Governmental Bodies and Officers

§ 179. Officers—Action to enforce performance of duty

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  689

As a general rule, in an action against a ministerial officer to enforce the performance of a statutory duty, the right to question the validity of a statute imposing such a duty is denied where he or she has no personal or property interest in the constitutional question invoked.

Subject to some limitations and exceptions, in an action against a ministerial officer to enforce the performance of a statutory duty, the right to question the validity of a statute imposing such a duty is denied where the officer has no personal or property interest¹ or no greater interest than that of any other citizen² in the constitutional question invoked. However, an officer may raise the question if the nature of his or her office is such as to require him or her to do so,³ if he or she is acting under the advice of the attorney general that the statute is unconstitutional,⁴ or if the rights of the State or public interests are involved,⁵ and the functions of the officer are not purely ministerial.⁶ The rule does not prohibit the officer from raising the constitutional question if his or her personal interests are affected by the operation of the statute.⁷

Under some authorities, ministerial officers are permitted to question the constitutionality of a statute or other governmental action imposing a duty on them⁸ even though no personal interest of theirs is affected by the statute.⁹ However, a ministerial officer cannot attack the constitutionality of a statute because it may violate the rights of some other officer¹⁰ or person¹¹ in order to avoid a mandatory duty imposed on him or her by the statute.

It is generally held that the constitutionality of a statute authorizing disbursement of public funds may be questioned by the officer on whom the duty of disbursement is imposed¹² although there is also authority to the contrary.¹³

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Footnotes

- 1 Iowa—[Board of Sup'r's of Linn County v. Department of Revenue](#), 263 N.W.2d 227 (Iowa 1978).
 La.—[Summerell v. Phillips](#), 258 La. 587, 247 So. 2d 542 (1971).
 Mass.—[Quinn v. School Committee of Plymouth](#), 332 Mass. 410, 125 N.E.2d 410 (1955).
 Minn.—[Bricelyn School Dist. No. 132, Faribault County v. Board of County Com'rs of Faribault County](#), 238 Minn. 63, 55 N.W.2d 602 (1952).
- 2 Minn.—[State v. Steele County Bd. of Com'rs](#), 181 Minn. 427, 232 N.W. 737, 71 A.L.R. 1190 (1930).
 Mo.—[State ex rel. State Bd. of Mediation v. Pigg](#), 362 Mo. 798, 244 S.W.2d 75 (1951).
- 3 S.C.—[Spartanburg County v. Miller](#), 135 S.C. 348, 132 S.E. 673 (1924).
- 4 Ky.—[Reeves v. Gerard](#), 255 S.W.2d 21 (Ky. 1953) (overruled on other grounds by, [Maynard v. Com. ex rel. Hancock](#), 538 S.W.2d 38 (Ky. 1976)).
 Mo.—[State, Webster Groves Loan & Building Ass'n. State ex rel. v. Brown](#), 334 Mo. 789, 68 S.W.2d 60 (1934).
 N.D.—[Solberg v. State Treasurer](#), 78 N.D. 806, 53 N.W.2d 49 (1952).
- 5 Minn.—[Elwell v. Hennepin County](#), 301 Minn. 63, 221 N.W.2d 538 (1974).
 N.D.—[Department of State Highways v. Baker](#), 69 N.D. 702, 290 N.W. 257, 129 A.L.R. 925 (1940).
- 6 Minn.—[Elwell v. Hennepin County](#), 301 Minn. 63, 221 N.W.2d 538 (1974).
- 7 Fla.—[City of Pensacola v. King](#), 47 So. 2d 317 (Fla. 1950) (overruled in part on other grounds by, [Barr v. Watts](#), 70 So. 2d 347 (Fla. 1953)).
 Ill.—[People ex rel. Hopf v. Barger](#), 30 Ill. App. 3d 525, 332 N.E.2d 649 (2d Dist. 1975).
 S.C.—[Spartanburg County v. Miller](#), 135 S.C. 348, 132 S.E. 673 (1924).
- 8 Cal.—[Craig v. Municipal Court](#), 100 Cal. App. 3d 69, 161 Cal. Rptr. 19 (2d Dist. 1979).
 Ky.—[Dorman v. Dell](#), 245 Ky. 34, 52 S.W.2d 892 (1932).
 Neb.—[Prendergast v. Nelson](#), 199 Neb. 97, 256 N.W.2d 657 (1977).
 Ohio—[State ex rel. Hostetter v. Hunt](#), 56 Ohio App. 120, 9 Ohio Op. 254, 24 Ohio L. Abs. 350, 10 N.E.2d 155 (5th Dist. Stark County 1937), aff'd, 132 Ohio St. 568, 8 Ohio Op. 558, 9 N.E.2d 676 (1937).
- Court order**
- Tex.—[Delta County Levee Imp. Dist. No. 2 v. Leonard](#), 559 S.W.2d 387 (Tex. Civ. App. Texarkana 1977), writ refused n.r.e., (Mar. 29, 1978).
 Tex.—[Holman v. Pabst](#), 27 S.W.2d 340 (Tex. Civ. App. Galveston 1930), writ refused, (Oct. 15, 1930).
 Conn.—[Levitt v. Attorney General](#), 111 Conn. 634, 151 A. 171 (1930).
 Ky.—[Dorman v. Dell](#), 245 Ky. 34, 52 S.W.2d 892 (1932).
 Mo.—[State ex rel. Missouri State Board of Agriculture v. Woods](#), 317 Mo. 403, 296 S.W. 381 (1927).
 Fla.—[City of Pensacola v. King](#), 47 So. 2d 317 (Fla. 1950) (overruled in part on other grounds by, [Barr v. Watts](#), 70 So. 2d 347 (Fla. 1953)).
 Ky.—[Metcalf v. Howard](#), 304 Ky. 498, 201 S.W.2d 197 (1947).
 Minn.—[Loew v. Hagerle Bros.](#), 226 Minn. 485, 33 N.W.2d 598 (1948).
 Mo.—[State ex rel. Volker v. Carey](#), 345 Mo. 811, 136 S.W.2d 324 (1940).
 N.H.—[Amyot v. Caron](#), 88 N.H. 394, 190 A. 134 (1937).
 N.C.—[Brown v. Board of Com'rs of Richmond County](#), 223 N.C. 744, 28 S.E.2d 104 (1943).
 N.D.—[Department of State Highways v. Baker](#), 69 N.D. 702, 290 N.W. 257, 129 A.L.R. 925 (1940).

- S.C.—[O'Shields v. Caldwell](#), 207 S.C. 194, 35 S.E.2d 184 (1945).
- Vt.—[Gross v. Gates](#), 109 Vt. 156, 194 A. 465 (1937).
- W. Va.—[State ex rel. Vincent v. Gainer](#), 151 W. Va. 1002, 158 S.E.2d 145 (1967).
- Wis.—[Federal Paving Corp. v. Prudisch](#), 235 Wis. 527, 293 N.W. 156 (1940).
- Wyo.—[State v. Hoskins](#), 29 Wyo. 198, 212 P. 766 (1923).
- 13 Colo.—[Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1 in City and County of Denver](#), 188 Colo. 310, 535 P.2d 200 (1975).

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16 C.J.S. Constitutional Law § 180

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

4. Particular Types of Laws or Governmental Actions or Policies Challenged

a. In General

§ 180. Particular types of laws or governmental actions or policies challenged, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  695, 697, 702 to 720

Standing principles have been applied in many different types of cases, including those involving education, labor, voting rights, and regulation of businesses.

The principles with respect to a person's standing to challenge the constitutionality of a constitutional provision, statute, or other governmental action have been applied to laws and practices concerning education,¹ including religious exercises in public schools,² labor or employment matters,³ including labor relations statutes,⁴ workers' compensation,⁵ and unemployment compensation;⁶ military affairs;⁷ voting and redistricting disputes;⁸ actions involving public utilities;⁹ actions involving land use regulations;¹⁰ and actions involving motor vehicles and motor carriers.¹¹

In addition, there have been adjudications regarding standing in connection with constitutional challenges to the licensing of persons, businesses, or occupations¹² and other regulatory statutes or governmental action respecting businesses or

occupations¹³ and revenue and taxation.¹⁴ Courts have also ruled on standing in family law matters,¹⁵ health care matters,¹⁶ and actions involving abortion.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Church failed to demonstrate substantial likelihood that finding that California Department of Managed Health Care's (DMHC) requirement that group health insurance plans provide coverage for all legal abortions violated its constitutional rights and state law would redress its alleged injury, and thus church lacked standing to bring action challenging DMHC's requirement, where DMHC could not order or force health care plan to create or offer plan that satisfied church's needs, DMHC could not create such plan itself, and no health care plans were party to suit. [Skyline Wesleyan Church v. California Department of Managed Health Care](#), 313 F. Supp. 3d 1225 (S.D. Cal. 2018).

Maryland and District of Columbia suffered injury-in-fact to their quasi-sovereign interests in protecting their equal sovereignty and position among sister states, as required to support Article III standing to pursue Domestic Emoluments Clause claim against President, but not Foreign Emoluments Clause claim, by other states' tax concessions granted to organization, of which President was sole owner and from which he derived financial benefits, that owned and operated District of Columbia hotel, and by allegedly being coerced to patronize hotel to obtain federal favors on par with other states; Maryland and District alleged they were forced to choose between losing revenue by granting organization's requests for concessions or denying requests and being disadvantaged as to other states. [U.S. Const. art. 1, § 9, cl. 8](#); [U.S. Const. art. 2, § 1, cl. 7](#); [U.S. Const. art. 3, § 2, cl. 1](#). [District of Columbia v. Trump](#), 291 F. Supp. 3d 725 (D. Md. 2018), subsequent determination, 2018 WL 3559027 (D. Md. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Board of Ed. of Central School Dist. No. 1 v. Allen](#), 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968); [Minarcini v. Strongsville City School Dist.](#), 541 F.2d 577 (6th Cir. 1976).
Colo.—[Sandoval v. Ryan](#), 535 P.2d 244 (Colo. App. 1975).
La.—[Johnson v. Board of Elementary and Secondary Educ.](#), 414 So. 2d 352, 4 Ed. Law Rep. 929 (La. 1982) (overruled on other grounds by, [Eiche v. Louisiana Bd. of Elementary and Secondary Educ.](#), 582 So. 2d 186, 68 Ed. Law Rep. 934 (La. 1991)).
N.J.—[Karcher v. Byrne](#), 146 N.J. Super. 532, 370 A.2d 87 (Law Div. 1977), judgment aff'd, 158 N.J. Super. 67, 385 A.2d 867 (App. Div. 1978), judgment aff'd, 79 N.J. 358, 399 A.2d 644 (1979).
Wash.—[Seattle School Dist. No. 1 of King County v. State](#), 90 Wash. 2d 476, 585 P.2d 71 (1978).
School finance
Kan.—[Gannon v. State](#), 298 Kan. 1107, 319 P.3d 1196, 302 Ed. Law Rep. 377 (2014).
Mass.—[Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School Dist.](#), 461 Mass. 366, 961 N.E.2d 83, 276 Ed. Law Rep. 411 (2012).
2 U.S.—[Elk Grove Unified School Dist. v. Newdow](#), 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98, 188 Ed. Law Rep. 17 (2004) (abrogated on other grounds by, [Lexmark Intern., Inc. v. Static Control Components, Inc.](#), 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)); [School Dist. of Abington Tp., Pa. v. Schempp](#), 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); [Caldwell v. Craighead](#), 432 F.2d 213, 14 Fed. R. Serv. 2d 550 (6th Cir. 1970).
3 U.S.—[Tony and Susan Alamo Foundation v. Secretary of Labor](#), 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985); [Savina Home Industries, Inc. v. Secretary of Labor](#), 594 F.2d 1358 (10th Cir. 1979).
Cal.—[Hooper v. Deukmejian](#), 122 Cal. App. 3d 987, 176 Cal. Rptr. 569 (1st Dist. 1981).

N.Y.—[Nothdurft v. Ross](#), 104 Misc. 2d 898, 429 N.Y.S.2d 844 (Sup 1980), judgment aff'd, 85 A.D.2d 658, 445 N.Y.S.2d 222 (2d Dep't 1981).

Wrongful discharge

Mont.—[Allmaras v. Yellowstone Basin Properties](#), 248 Mont. 477, 812 P.2d 770 (1991).

4 U.S.—[Resident Participation of Denver, Inc. v. Love](#), 322 F. Supp. 1100 (D. Colo. 1971); [Wisconsin State Emp. Ass'n, Council 24, AFSCME, AFL-CIO v. Wisconsin Natural Resources Bd.](#), 298 F. Supp. 339, 13 Fed. R. Serv. 2d 525 (W.D. Wis. 1969).

5 Alaska—[Municipality of Anchorage v. Leigh](#), 823 P.2d 1241 (Alaska 1992).

Ark.—[Estate of Donley v. Pace Industries](#), 336 Ark. 101, 984 S.W.2d 421 (1999).

Conn.—[Bergeson v. City of New London](#), 269 Conn. 763, 850 A.2d 184 (2004).

Fla.—[Robbins v. Rophie Shoes, Inc.](#), 413 So. 2d 839 (Fla. 1st DCA 1982).

Ill.—[Goldblatt Bros., Inc. v. Industrial Commission](#), 86 Ill. 2d 141, 56 Ill. Dec. 38, 427 N.E.2d 118 (1981).

Iowa—[Godfrey v. State](#), 752 N.W.2d 413 (Iowa 2008).

Neb.—[Muller v. Tri-State Ins. Co. of Minnesota](#), 252 Neb. 1, 560 N.W.2d 130 (1997).

N.M.—[Wagner v. AGW Consultants](#), 2005-NMSC-016, 137 N.M. 734, 114 P.3d 1050 (2005).

Va.—[Com., Dept. of State Police v. Hines](#), 221 Va. 626, 272 S.E.2d 210 (1980).

6 U.S.—[McKay v. Horn](#), 529 F. Supp. 847 (D.N.J. 1981).

Mo.—[Craig v. Jo B. Gardner, Inc.](#), 586 S.W.2d 316 (Mo. 1979).

7 U.S.—[Holtzman v. Schlesinger](#), 484 F.2d 1307 (2d Cir. 1973); [Mottola v. Nixon](#), 464 F.2d 178 (9th Cir. 1972).

8 U.S.—[Sinkfield v. Kelley](#), 531 U.S. 28, 121 S. Ct. 446, 148 L. Ed. 2d 329 (2000); [Shaw v. Hunt](#), 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996).

Initiative petition

An incorporator of a group that sponsored a statewide initiative petition to amend the constitution to repeal all state taxes and impose a state sales tax lacked standing to bring a petition for a declaration of sufficiency either before the Secretary of State or the supreme court; the purpose of the declaration of sufficiency process was to facilitate the operation of a constitutional amendment that allowed initiative petitions by providing for the timely and expeditious review of the legal sufficiency of petitions, but without the existence of adverse parties, any review under the statute would have amounted to little more than an advisory opinion.

Ark.—[Woodrome v. Daniels](#), 2010 Ark. 244, 370 S.W.3d 190 (2010).

9 N.D.—[Minnkota Power Co-op., Inc. v. Lake Shure Properties](#), 295 N.W.2d 122 (N.D. 1980).

Pa.—[Philadelphia Facilities Management Corp. v. Biester](#), 60 Pa. Commw. 366, 431 A.2d 1123 (1981).

Eminent domain power

Miss.—[City of Starkville v. 4-County Elec. Power Ass'n](#), 909 So. 2d 1094 (Miss. 2005).

10 Fla.—[Walton County v. Stop Beach Renourishment, Inc.](#), 998 So. 2d 1102 (Fla. 2008), aff'd, 560 U.S. 702, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

Or.—[MacPherson v. Department of Administrative Services](#), 340 Or. 117, 130 P.3d 308 (2006).

Pa.—[Robinson Tp., Washington County v. Com.](#), 623 Pa. 564, 83 A.3d 901 (2013).

11 U.S.—[Hicklin v. Coney](#), 290 U.S. 169, 54 S. Ct. 142, 78 L. Ed. 247 (1933).

Fla.—[Alterman Transport Lines, Inc. v. State](#), 405 So. 2d 456 (Fla. 1st DCA 1981).

Ga.—[Smith v. State](#), 248 Ga. 828, 286 S.E.2d 709 (1982).

Utah—[Cavaness v. Cox](#), 598 P.2d 349 (Utah 1979).

12 Ga.—[Harrison v. Wigington](#), 269 Ga. 388, 497 S.E.2d 568 (1998).

Conn.—[Brunswick Corp. v. Liquor Control Commission](#), 184 Conn. 75, 440 A.2d 792 (1981).

La.—[Louisiana Hotel-Motel Ass'n, Inc. v. East Baton Rouge Parish](#), 385 So. 2d 1193 (La. 1980).

Mass.—[Com. v. Blackgammon's, Inc.](#), 382 Mass. 610, 417 N.E.2d 377 (1981).

N.J.—[Application of Martin](#), 90 N.J. 295, 447 A.2d 1290 (1982).

N.C.—[In re Guess](#), 327 N.C. 46, 393 S.E.2d 833 (1990).

Liquor license

Ga.—[Trop, Inc. v. City of Brookhaven](#), 296 Ga. 85, 764 S.E.2d 398 (2014).

Gaming license

Ind.—[Foundations of East Chicago, Inc. v. City of East Chicago](#), 927 N.E.2d 900 (Ind. 2010), decision clarified on reh'g, 933 N.E.2d 874 (Ind. 2010).

Pa.—[Pittsburgh Palisades Park, LLC v. Com.](#), 585 Pa. 196, 888 A.2d 655 (2005).

- Firearms license**
- Mo.—[Taylor v. State](#), 247 S.W.3d 546 (Mo. 2008).
- 13 U.S.—[California Bankers Ass'n v. Shultz](#), 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974); [Hetherton v. Sears, Roebuck & Co.](#), 652 F.2d 1152 (3d Cir. 1981); [Basiardanes v. City of Galveston](#), 682 F.2d 1203 (5th Cir. 1982); [Myron v. Chicoine](#), 678 F.2d 727 (7th Cir. 1982); [Postscript Enterprises, Inc. v. Whaley](#), 658 F.2d 1249 (8th Cir. 1981).
- Conn.—[Caldor's, Inc. v. Bedding Barn, Inc.](#), 177 Conn. 304, 417 A.2d 343, 10 A.L.R.4th 230 (1979).
- Ill.—[Cook County v. World Wide News Agency](#), 98 Ill. App. 3d 1094, 54 Ill. Dec. 270, 424 N.E.2d 1173 (1st Dist. 1981).
- N.J.—[Application of Martin](#), 90 N.J. 295, 447 A.2d 1290 (1982).
- 14 U.S.—[U.S. v. Windsor](#), 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
- Ala.—[Stiff v. Alabama Alcoholic Beverage Control Bd.](#), 878 So. 2d 1138 (Ala. 2003).
- Kan.—[In re Cent. Illinois Public Services Co.](#), 276 Kan. 612, 78 P.3d 419 (2003).
- La.—[Fransen v. City of New Orleans](#), 988 So. 2d 225 (La. 2008).
- N.Y.—[New York Ass'n of Convenience Stores v. Urbach](#), 92 N.Y.2d 204, 677 N.Y.S.2d 280, 699 N.E.2d 904 (1998).
- Ohio—[Columbia Gas Transm. Corp. v. Levin](#), 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008)
- Property tax**
- Fla.—[Crossings At Fleming Island Community Development Dist. v. Echeverri](#), 991 So. 2d 793 (Fla. 2008).
- Cigarette tax**
- Idaho—[Gallagher v. State](#), 141 Idaho 665, 115 P.3d 756 (2005).
- Liquor tax**
- Ill.—[Wexler v. Wirtz Corp.](#), 211 Ill. 2d 18, 284 Ill. Dec. 294, 809 N.E.2d 1240 (2004).
- Wyo.—[Matter of the Adoption of BGH](#), 930 P.2d 371 (Wyo. 1996) (adoption).
- 15 **Visitation**
- Mass.—[Blixt v. Blixt](#), 437 Mass. 649, 774 N.E.2d 1052 (2002).
- Property division**
- Mo.—[Silcox v. Silcox](#), 6 S.W.3d 899 (Mo. 1999).
- Custody**
- The supreme judicial court would not consider a defendant's unconstitutional-as-applied challenge to a statute that awarded the custody of children out of wedlock to mothers where the defendant acquiesced to the arrangement regarding physical custody, the defendant and the child's mother reached a custody agreement regarding physical custody following their separation, and the fact that the defendant filed for legal, rather than physical, custody was indicative of his intention to relinquish the right to custody that he purported to raise in the case at bar.
- Mass.—[Com. v. Gonzalez](#), 462 Mass. 459, 969 N.E.2d 655 (2012).
- 16 U.S.—[Clinton v. City of New York](#), 524 U.S. 417, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998).
- Ariz.—[Biggs v. Cooper ex rel. County of Maricopa](#), 236 Ariz. 415, 341 P.3d 457 (2014).
- N.M.—[Cummings v. X-Ray Associates of New Mexico, P.C.](#), 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321 (1996).
- Medical malpractice actions**
- Ark.—[Childers v. H. Louis Payne, D.C.](#), 369 Ark. 201, 252 S.W.3d 129 (2007).
- Me.—[Smith v. Hawthorne](#), 2006 ME 19, 892 A.2d 433 (Me. 2006).
- 17 § 183.

16 C.J.S. Constitutional Law § 181

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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4. Particular Types of Laws or Governmental Actions or Policies Challenged

a. In General

§ 181. Discriminatory statutes, actions, or policies

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Generally, persons not belonging to the class alleged to be discriminated against may not attack the validity of a statute or governmental policy or practice on the ground that it discriminates between persons or classes of persons; the complaining party must show injury by the alleged discrimination.

Ordinarily, a question as to the constitutionality of a statute or other governmental action on the ground that it denies equal rights and privileges by discriminating between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against.¹ White persons may ordinarily not question the constitutionality of a statute on the ground that it discriminates against racial minorities.² A male may not question the validity of a statute or governmental policy as discriminating against women,³ or a woman question a statute as discriminating against men,⁴ and an adult may not raise an equal protection challenge to a statute allegedly discriminating against juveniles.⁵ A resident or citizen may not question the validity of an act as discriminating against those who are not residents or citizens,⁶ and one not a citizen of the state may not question discrimination between citizens or classes of citizens.⁷

A person may not question the validity of a statute or policy as discriminatory where he or she has not been⁸ or could not have been⁹ injured by or subject to the discrimination, and the question of discrimination may not be raised by one who is benefited, rather than injured, by the alleged discrimination.¹⁰ The relevant inquiry on standing is whether plaintiffs have suffered unlawful treatment under defendant's policy, not whether the unlawful treatment is insurmountable or the benefit can be realized through alternative means; when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.¹¹ For purposes of standing, a denial of equal treatment is an actual injury even when the complainant is able to overcome the challenged barrier.¹²

A person who has actually sustained injury as the result of a discriminatory statute, practice, or policy, or who belongs to a class discriminated against, has standing to challenge the discriminatory feature¹³ even if he or she is not a member of the class against whom the discrimination is directed.¹⁴ A civil litigant has standing to complain of an equal protection challenge to a jury panelist excluded on the basis of race through whether or not the defendant and the excluded jurors share the same race.¹⁵

Employment discrimination.

Plaintiffs will normally have standing to bring facial challenges to de jure employment policies but not de facto ones, in an employment discrimination action, even if those de facto policies are as unyielding as the de jure policies.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Regulatory burdens that placement preferences of Indian Child Welfare Act (ICWA) and Department of Interior rule imposed on parents in proceedings to adopt Indian child were sufficient to demonstrate injury necessary for standing to challenge placement preferences as violation of equal protection clause, although alternative placement sought by tribe failed to materialize. [U.S. Const. Amend. 14](#); [Indian Child Welfare Act of 1978, § 105](#), [25 U.S.C.A. § 1915\(a, b\)](#); [25 C.F.R. §§ 23.129, 23.130, 23.131, 23.132](#). [Brackeen v. Bernhardt](#), [937 F.3d 406](#) (5th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[McConnell v. Federal Election Com'n](#), [540 U.S. 93](#), [124 S. Ct. 619](#), [157 L. Ed. 2d 491](#) (2003) (overruled on other grounds by, [Citizens United v. Federal Election Com'n](#), [558 U.S. 310](#), [130 S. Ct. 876](#), [175 L. Ed. 2d 753](#) (2010)).
Colo.—[People in Interest of E.I.C.](#), [958 P.2d 511](#) (Colo. App. 1998).
Conn.—[State v. Couture](#), [218 Conn. 309](#), [589 A.2d 343](#) (1991).
Ga.—[Bell v. Austin](#), [278 Ga. 844](#), [607 S.E.2d 569](#) (2005).
Ill.—[Weipert v. Illinois Dept. of Professional Regulation](#), [337 Ill. App. 3d 282](#), [271 Ill. Dec. 621](#), [785 N.E.2d 553](#) (4th Dist. 2003).
Kan.—[In re Cent. Illinois Public Services Co.](#), [276 Kan. 612](#), [78 P.3d 419](#) (2003).
La.—[State v. Sandifer](#), [679 So. 2d 1324](#) (La. 1996).
Mass.—[Blixt v. Blixt](#), [437 Mass. 649](#), [774 N.E.2d 1052](#) (2002).

Mich.—[Scalise v. Boy Scouts of America](#), 265 Mich. App. 1, 692 N.W.2d 858, 195 Ed. Law Rep. 961 (2005).
Mo.—[Hopper v. Hopper](#), 854 S.W.2d 628 (Mo. Ct. App. E.D. 1993).
N.M.—[Cummings v. X-Ray Associates of New Mexico, P.C.](#), 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321 (1996).
N.C.—[Saine v. State](#), 210 N.C. App. 594, 709 S.E.2d 379, 267 Ed. Law Rep. 897 (2011).
Pa.—[Com. v. Gautieri](#), 431 Pa. Super. 412, 636 A.2d 1153 (1994).
Va.—[Jackson v. Com.](#), 44 Va. App. 218, 604 S.E.2d 122 (2004).
Vt.—[Medical Center Hosp. of Vermont v. Lorrain](#), 165 Vt. 12, 675 A.2d 1326 (1996).
Wash.—[State v. Handley](#), 115 Wash. 2d 275, 796 P.2d 1266 (1990).
Wis.—[Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund](#), 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849 (2000).

Same-sex married couples

The same-sex partner of a deceased highway patrolman lacked standing to challenge a ban on survivor benefits for same-sex married couples, where he was not a member of the class of people disadvantaged by that statute, as the statute only recognized marriage between a man and a woman for the purpose of determining who was a spouse under the public retirement benefits statutes, and the statute did not distinguish between same-sex couples and opposite-sex couples generally but only between same-sex and opposite-sex married couples.

Mo.—[Glossip v. Missouri Dept. of Transp. and Highway Patrol Employees' Retirement System](#), 411 S.W.3d 796 (Mo. 2013).

2 U.S.—[Sinkfield v. Kelley](#), 531 U.S. 28, 121 S. Ct. 446, 148 L. Ed. 2d 329 (2000).

Causation

Standing to complain of stigmatic injury from discriminatory treatment on the basis of race requires identification of some concrete interest with respect to which plaintiffs are personally subject to discriminatory treatment, and that interest must independently satisfy the causation requirement of the standing doctrine.

U.S.—[Allen v. Wright](#), 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556, 18 Ed. Law Rep. 82 (1984) (abrogated on other grounds by, [Lexmark Intern., Inc. v. Static Control Components, Inc.](#), 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)).

3 Ill.—[People v. Sherrod](#), 50 Ill. App. 3d 532, 8 Ill. Dec. 607, 365 N.E.2d 993 (1st Dist. 1977).

La.—[Hodson v. Hodson](#), 304 So. 2d 847 (La. Ct. App. 2d Cir. 1974).

N.Y.—[People v. D'Arcy](#), 79 Misc. 2d 113, 359 N.Y.S.2d 453 (County Ct. 1974).

N.D.—[Flatt ex rel. Flatt v. Kantak](#), 2004 ND 173, 687 N.W.2d 208 (N.D. 2004).

4 U.S.—[Feinerman v. Jones](#), 356 F. Supp. 252 (M.D. Pa. 1973).

Fla.—[In re Humphreys' Estate](#), 299 So. 2d 595 (Fla. 1974).

5 Ark.—[Leshe v. State](#), 304 Ark. 442, 803 S.W.2d 522 (1991).

Wash.—[State v. Farmer](#), 116 Wash. 2d 414, 805 P.2d 200, 13 A.L.R.5th 1070 (1991), amended on other grounds on denial of reconsideration, 812 P.2d 858 (Wash. 1991).

N.Y.—[People v. Dahlman](#), 87 Misc. 2d 261, 383 N.Y.S.2d 946 (App. Term 1976).

N.D.—[Benson v. Schneider](#), 68 N.W.2d 665 (N.D. 1955).

8 U.S.—[White v. Thomas](#), 660 F.2d 680 (5th Cir. 1981).

Fla.—[Florida High School Activities Ass'n, Inc. v. Bradshaw](#), 369 So. 2d 398 (Fla. 2d DCA 1979).

Ga.—[Carnegie v. State](#), 246 Ga. 187, 269 S.E.2d 457 (1980).

Ill.—[People v. Blackorby](#), 146 Ill. 2d 307, 166 Ill. Dec. 902, 586 N.E.2d 1231 (1992).

Okl.—[Morin v. Coral Swimming Pool Supply Co.](#), 1993 OK CIV APP 197, 867 P.2d 494 (Ct. App. Div. 3 1993).

Tex.—[Grant v. State](#), 505 S.W.2d 279 (Tex. Crim. App. 1974).

9 Ga.—[Drummond v. Fulton County Dept. of Family and Children Services](#), 237 Ga. 449, 228 S.E.2d 839 (1976).

La.—[Succession of Matte](#), 346 So. 2d 1345 (La. Ct. App. 3d Cir. 1977).

N.J.—[Frazier v. Liberty Mut. Ins. Co.](#), 150 N.J. Super. 123, 374 A.2d 1259 (Law Div. 1977).

N.Y.—[People v. Pacheco](#), 53 N.Y.2d 663, 438 N.Y.S.2d 994, 421 N.E.2d 114 (1981).

Utah—[Committee of Consumer Services v. Public Service Commission of Utah](#), 638 P.2d 533 (Utah 1981).

Wash.—[State v. Dalton](#), 13 Wash. App. 94, 533 P.2d 864 (Div. 3 1975).

Membership policy of private club

Where plaintiff who, because of his race, had been denied service as a guest of member of private club had not applied for or been denied membership in club, he had no standing to contest club's membership practices.

U.S.—[Moose Lodge No. 107 v. Irvis](#), 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972).

10 U.S.—[Shearer v. Burnet](#), 285 U.S. 228, 52 S. Ct. 332, 76 L. Ed. 724 (1932).

Ga.—[Gleason v. City Council of Augusta](#), 242 Ga. 796, 251 S.E.2d 536 (1979).

11 U.S.—[Loder v. McKinney](#), 896 F. Supp. 2d 1116 (M.D. Ala. 2012).

Affirmative action

When a plaintiff challenges a race-based affirmative action program, the injury-in-fact, to establish standing in federal court under Article III of the Constitution, is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

U.S.—[Jana-Rock Const., Inc. v. New York State Dept. of Economic Development](#), 438 F.3d 195 (2d Cir. 2006).

12 U.S.—[Common Cause/Georgia v. Billups](#), 554 F.3d 1340 (11th Cir. 2009).

13 U.S.—[U.S. v. Hays](#), 515 U.S. 737, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995).

Alaska—[Douglas v. Glacier State Tel. Co.](#), 615 P.2d 580 (Alaska 1980).

Ariz.—[Lerma v. Keck](#), 186 Ariz. 228, 921 P.2d 28 (Ct. App. Div. 1 1996).

Ark.—[Huffman v. Dawkins](#), 273 Ark. 520, 622 S.W.2d 159 (1981).

Haw.—[Shibuya v. Architects Hawaii Ltd.](#), 65 Haw. 26, 647 P.2d 276 (1982).

Idaho—[Phinney v. Shoshone Medical Center](#), 131 Idaho 529, 960 P.2d 1258 (1998).

Ky.—[Roberts v. Mooneyhan](#), 902 S.W.2d 842, 102 Ed. Law Rep. 851 (Ky. Ct. App. 1995).

Mass.—[Lowell v. Kowalski](#), 380 Mass. 663, 405 N.E.2d 135 (1980).

Or.—[In re Marriage of Crocker](#), 332 Or. 42, 22 P.3d 759 (2001).

Pa.—[Com. v. Bonadio](#), 490 Pa. 91, 415 A.2d 47 (1980).

Vt.—[Medical Center Hosp. of Vermont v. Lorrain](#), 165 Vt. 12, 675 A.2d 1326 (1996).

Customers of class

A cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a state ultimately discriminates, and customers of that class may also be injured.

U.S.—[General Motors Corp. v. Tracy](#), 519 U.S. 278, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997).

14 U.S.—[Wall & Ochs, Inc. v. Grasso](#), 469 F. Supp. 1088 (D. Conn. 1979).

Cal.—[Burns v. State Compensation Ins. Fund](#), 265 Cal. App. 2d 98, 71 Cal. Rptr. 326 (1st Dist. 1968).

Ill.—[Tavern Owners Ass'n of Lake County, Illinois, Inc. v. Lake County](#), 52 Ill. App. 3d 542, 10 Ill. Dec. 295, 367 N.E.2d 748 (2d Dist. 1977).

Where litigant has independent basis for standing

Md.—[State Administrative Bd. of Election Laws v. Board of Sup'rs of Elections of Baltimore City](#), 342 Md. 586, 679 A.2d 96 (1996).

15 U.S.—[Edmonson v. Leesville Concrete Co., Inc.](#), 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

Ark.—[Wingate Taylor-Maid Transp., Inc. v. Baker](#), 310 Ark. 731, 840 S.W.2d 179 (1992).

As to standing to raise an equal protection challenge to a peremptory strike in a criminal case, see § 187.

16 U.S.—[Worth v. Jackson](#), 451 F.3d 854 (D.C. Cir. 2006).

16 C.J.S. Constitutional Law § 182

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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4. Particular Types of Laws or Governmental Actions or Policies Challenged

a. In General

§ 182. Discriminatory statutes, actions, or policies—Equal protection challenge

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In the context of an equal protection challenge to a statute, standing requires the plaintiff to: (1) identify a statutory classification that distinguishes between similarly situated persons in the exercise of a right or the receipt of a benefit; (2) show that the plaintiff is a member of the disadvantaged class; and (3) demonstrate that, but for the challenged classification, the plaintiff would be eligible for the right or benefit.

The bar against standing to assert generalized grievances about the lawfulness of government acts applies to equal protection claims, and a plaintiff's failure to allege that he or she has been denied equal treatment will deprive the plaintiff of standing.¹ In the context of an equal protection challenge to a statute, standing requires the plaintiff to: (1) identify a statutory classification that distinguishes between similarly situated persons in the exercise of a right or the receipt of a benefit; (2) show that the plaintiff is a member of the disadvantaged class; and (3) demonstrate that, but for the challenged classification, the plaintiff would be eligible for the right or benefit.² Thus, generally, in order to have standing, the one challenging legislation on the basis of equal protection must be a member of the class the statute identifies or allegedly discriminates against and must have been injured by it.³ To have standing to raise an equal protection challenge to government action, a litigant must demonstrate a direct

nexus between the statute's operation and his or her interest and must show that the allegedly unconstitutional feature of the statute injures him or her and operates to deprive him or her of a constitutional right.⁴

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier on equal protection grounds need not allege that he or she would have obtained the benefit but for the barrier in order to establish standing.⁵ The injury-in-fact necessary to establish standing in a case involving an equal protection challenge is the denial of equal treatment resulting from the imposition of a barrier, not the plaintiff's ultimate inability to obtain a benefit.⁶ Where such a barrier exists, the plaintiff need only demonstrate that he or she is ready and able to perform and that a discriminatory policy prevents him or her from doing so on equal basis.⁷ Thus, intent may be relevant to the standing inquiry in an equal protection challenge.⁸

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Footnotes

1 Tex.—[Andrade v. NAACP of Austin](#), 345 S.W.3d 1 (Tex. 2011).

2 Mo.—[Glossip v. Missouri Dept. of Transp. and Highway Patrol Employees' Retirement System](#), 411 S.W.3d 796 (Mo. 2013).

3 Ohio—[N. Canton v. Canton](#), 114 Ohio St. 3d 253, 2007-Ohio-4005, 871 N.E.2d 586 (2007).

4 Neb.—[City of Ralston v. Balka](#), 247 Neb. 773, 530 N.W.2d 594 (1995).

Zone of interests

Purchasers' interests in being free from unconstitutional sex discrimination due to a higher tariff imposed on leather gloves used by men than for gloves used by women, under the Harmonized Tariff Schedule of the United States (HTSUS), were within the zone of interests to be protected by Equal Protection Clause, and thus, an importer of men's gloves had prudential standing to pursue an equal protection claim.

U.S.—[Totes-Isotoner Corp. v. U.S.](#), 594 F.3d 1346 (Fed. Cir. 2010).

Favoring union employees over nonunion employees

An employer and its insurer did not having standing in a workers' compensation case to raise the claim that to include fringe benefits in calculating average weekly wages for union employees constituted discriminatory treatment between two classes of employees, favoring the union employee in violation of the equal protection clauses of the federal and state constitutions.

Mass.—[McCarty's Case](#), 445 Mass. 361, 837 N.E.2d 669 (2005).

5 Iowa—[Horsfield Materials, Inc. v. City of Dyersville](#), 834 N.W.2d 444 (Iowa 2013).

6 U.S.—[Gratz v. Bollinger](#), 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 177 Ed. Law Rep. 851 (2003).

Iowa—[Horsfield Materials, Inc. v. City of Dyersville](#), 834 N.W.2d 444 (Iowa 2013).

7 U.S.—[Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.](#), 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993).

Overage applicant

A white applicant for a police officer position was not able and ready for appointment to the police force, and thus lacked standing to seek prospective relief on his claim that a city's affirmative action program violated the Equal Protection Clause, where he had reached age 32 and thus was ineligible for hire under state statute.

Mass.—[Donahue v. City of Boston](#), 371 F.3d 7 (1st Cir. 2004).

8 U.S.—[Gratz v. Bollinger](#), 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 177 Ed. Law Rep. 851 (2003).

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§ 183. Abortion statutes

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General standing principles apply in challenges to abortion statutes.

The general principles of standing to challenge an allegedly unconstitutional criminal statute by one not prosecuted are applicable to those who challenge abortion statutes.¹ There must be an assertion of a sufficiently direct threat of personal detriment;² an indirect injury or speculative threat of prosecution is insufficient.³ A woman who is pregnant at the time of the commencement of the action has standing,⁴ as does a physician who faces potential liability for violating an abortion statute, to assert a constitutional challenge to an abortion statute.⁵ In the context of challenges to abortion restrictions, the existence of an abortion regulation aimed at physicians that would prevent or chill a pregnant woman from seeking an abortion she would otherwise seek is sufficient to satisfy the Article III injury requirement.⁶

A physician or organization may also have standing to assert the rights of patients,⁷ such as privacy rights.⁸ However, if an organization's own interests are not harmed by a statute or policy, it lacks standing to bring a constitutional challenge to the statute or policy.⁹

CUMULATIVE SUPPLEMENT

Cases:

Abortion providers and clinics could bring suit claiming Louisiana law, which required doctors who performed abortions to hold active admitting privileges at a hospital located not further than 30 miles from the location at which the abortion was performed or induced, infringed their patients rights to access an abortion; the providers were challenging a law that regulated their conduct, the threatened imposition of governmental sanctions for noncompliance eliminated any risk that their claims were abstract or hypothetical, and as the parties who actually had to go through the process of applying for and maintaining admitting privileges, they were far better positioned than their patients to address the burdens of compliance. (Per Justice Breyer, joined by three Justices, with Chief Justice Roberts concurring in the judgment.) [La. Rev. Stat. Ann. § 40:1061.10\(A\)\(2\)\(a\). June Medical Services L. L. C. v. Russo, 140 S. Ct. 2103 \(2020\)](#).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 \(1976\)](#).

2 U.S.—[Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 \(1976\)](#).

3 U.S.—[Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 \(1973\)](#) (holding modified on other grounds by, [Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 \(1992\)](#)).

Wyo.—[Doe v. Burk, 513 P.2d 643 \(Wyo. 1973\)](#).

4 U.S.—[Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 \(1973\); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 \(1973\)](#) (holding modified on other grounds by, [Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 \(1992\)](#)).

5 U.S.—[Diamond v. Charles, 476 U.S. 54, 106 S. Ct. 1697, 90 L. Ed. 2d 48 \(1986\); Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 \(9th Cir. 2004\)](#).

Previability abortions

(1) Physicians alleged a sufficiently concrete injury to give them Article III standing to challenge, on their own behalf and on behalf of their patients, the constitutionality of an Arizona statute banning providers from performing abortions on women whose pregnancies had reached 20 weeks gestation where the physicians alleged that they performed and would continue to perform previability abortions on patients at or after 20 weeks gestation for which they would face criminal penalties if the 20-week law went into effect.

U.S.—[Isaacson v. Horne, 716 F.3d 1213 \(9th Cir. 2013\), cert. denied, 134 S. Ct. 905, 187 L. Ed. 2d 778 \(2014\)](#).

(2) A physician satisfied Article III's injury requirement on his challenge to the criminal provisions of Idaho's abortion laws, in that he faced a credible threat of prosecution and a potential chilling effect on his medical practice, by stating under oath that he would have prescribed an FDA-approved medication to women seeking previability medical abortions through the second trimester but for those criminal provisions.

U.S.—[McCormack v. Hiedeman, 900 F. Supp. 2d 1128 \(D. Idaho 2013\)](#).

6 U.S.—[McCormack v. Hiedeman, 900 F. Supp. 2d 1128 \(D. Idaho 2013\)](#).

- 7 U.S.—[Diamond v. Charles](#), 476 U.S. 54, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986); [Planned Parenthood of Idaho, Inc. v. Wasden](#), 376 F.3d 908 (9th Cir. 2004).
- Alaska—[State v. Planned Parenthood of Alaska](#), 35 P.3d 30 (Alaska 2001).
- Miss.—[Pro-Choice Mississippi v. Fordice](#), 716 So. 2d 645 (Miss. 1998).
- N.M.—[New Mexico Right to Choose/NARAL v. Johnson](#), 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841 (1998).
- Obstacles to suits by patients**
- A physician had third-party standing to assert the interests of his patients in a challenge to the constitutionality of a state's ban on "partial-birth" abortions, given the unique fiduciary-like relationship between doctor and patient, and the fact that pregnant women who were the physician's patients had significant obstacles to bringing suit on their own, such as desire for privacy and the likelihood that their claims would be mooted by the time-sensitive nature of pregnancy and abortion.
- U.S.—[Carhart v. Stenberg](#), 972 F. Supp. 507 (D. Neb. 1997).
- 8 U.S.—[Deerfield Medical Center v. City of Deerfield Beach](#), 661 F.2d 328 (5th Cir. 1981); [Friendship Medical Center, Ltd. v. Chicago Bd. of Health](#), 505 F.2d 1141 (7th Cir. 1974).
- Mont.—[Armstrong v. State](#), 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (1999).
- N.M.—[New Mexico Right to Choose/NARAL v. Johnson](#), 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841 (1998).
- As to standing to assert privacy rights, generally, see § 166.
- 9 U.S.—[Center for Reproductive Law and Policy v. Bush](#), 304 F.3d 183 (2d Cir. 2002), holding that an organization that advocated reproductive rights lacked prudential standing to assert a due process challenge to the federal policy requiring foreign nongovernmental organizations to agree not to perform or promote abortions as a condition of receiving funds from the United States when the organization alleged that the restrictions imposed failed to give clear notice of what political speech, public education, and law reform activities were prohibited and also encouraged arbitrary and discriminatory enforcement, inasmuch as it was foreign organizations who allegedly were left uncertain of their rights by the restrictions' purportedly unconstitutionally vague language, and the plaintiff organization did not assert harm to its own due process interest.

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a. In General

§ 184. Statutes impairing obligation of contracts

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 730

A statute may not be attacked as impairing the obligation of a contract by one whose rights are not injuriously affected thereby.

To bring a claim for a violation of the Contract Clause of the United States Constitution, a plaintiff must allege facts demonstrating that he or she possesses contractual rights that have been substantially impaired by the challenged law; if the threshold inquiry is met, the court must determine if the State has a significant or legitimate purpose behind the regulation.¹ The unconstitutionality of a statute on the ground that it impairs the obligation of a contract may not be raised by one whose rights are not injuriously affected by the statute.² Accordingly, one who does not have an interest in the contract involved is not in a position to raise this constitutional question.³ Furthermore, a person who is benefited rather than injured by the alleged unconstitutional feature of the statute lacks standing to challenge its constitutionality.⁴

Persons whose contracts have expired may not assert Contract Clause claims.⁵

A subordinate political entity, such as a county, may not challenge a state's actions under the Contract Clause.⁶

On the other hand, any party to a contract whose rights are affected by a statute impairing its obligation may contest its validity⁷ provided the contract is valid in its inception.⁸

Although it has been held otherwise,⁹ under some authority, beneficiaries of life insurance policies have standing to assert impairment of contract claims concerning statutes providing that divorce revokes an insured's designation of his or her former spouse as beneficiary.¹⁰

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Footnotes

- 1 U.S.—[Young v. Hawaii](#), 911 F. Supp. 2d 972 (D. Haw. 2012).
- 2 Ala.—[Long v. King](#), 233 Ala. 379, 171 So. 738 (1936).
Ark.—[Harris v. Little Red River Levee Dist. No. 2](#), 188 Ark. 975, 69 S.W.2d 877 (1934).
Cal.—[Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.](#), 111 Cal. App. 688, 296 P. 933 (4th Dist. 1931).
Colo.—[U.S. Bldg. & Loan Ass'n v. McClelland](#), 95 Colo. 292, 36 P.2d 164 (1934).
Ind.—[Department of Treasury v. Foster](#), 215 Ind. 217, 18 N.E.2d 783 (1939).
La.—[State ex rel. Porterie v. Walmsley](#), 183 La. 139, 162 So. 826 (1935).
Md.—[Gathwright v. Mayor and Council of City of Baltimore](#), 181 Md. 362, 30 A.2d 252, 145 A.L.R. 590 (1943).
Mo.—[Collector of Revenue of Jackson County v. Parcels of Land Encumbered with Delinquent Tax Liens](#), 356 Mo. 1133, 205 S.W.2d 568 (1947).
Ohio—[State ex rel. City of Youngstown v. Jones](#), 136 Ohio St. 130, 16 Ohio Op. 73, 24 N.E.2d 442 (1939).
Pa.—[Retirement Board of Allegheny County v. McGovern](#), 316 Pa. 161, 174 A. 400 (1934).
Tenn.—[State ex rel. Cope v. Mayor and Aldermen of Town of Morristown](#), 218 Tenn. 593, 404 S.W.2d 798 (1966).
Wash.—[Vance Lumber Co. v. King County](#), 184 Wash. 402, 51 P.2d 623 (1935).
Wis.—[Smith v. Burns](#), 65 Wis. 2d 638, 223 N.W.2d 562 (1974).
Wyo.—[State v. Cole](#), 43 Wyo. 209, 299 P. 1040 (1931).
- 3 Cal.—[Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.](#), 111 Cal. App. 688, 296 P. 933 (4th Dist. 1931).
Iowa—[Peverill v. Board of Sup'rs of Black Hawk County](#), 201 Iowa 1050, 205 N.W. 543 (1925).
Okla.—[Davis v. McCasland](#), 1938 OK 28, 182 Okla. 49, 75 P.2d 1118 (1938).
Tenn.—[Cunningham v. Broadbent](#), 177 Tenn. 202, 147 S.W.2d 408 (1941).
- Collective bargaining agreements**
An employee benefits trust lacked standing to assert a claim that Maine statutes allowing school districts to obtain their own aggregate loss information from health insurers and requiring school districts to use this information to obtain competitive bids for employee health insurance every five years impaired collective bargaining agreements between trust enrollees and their employers, in violation of the Contract Clause, since trust was not a party to collective bargaining agreements, and the district and local unions did not face any obstacles that prevented them from bringing their own claims.
- Me.—[Maine Educ. Ass'n Benefits Trust v. Cioppa](#), 842 F. Supp. 2d 373, 281 Ed. Law Rep. 1003 (D. Me. 2012).
- 4 Ark.—[Citicorp Indus. Credit, Inc. v. Wal-Mart Stores, Inc.](#), 305 Ark. 530, 809 S.W.2d 815 (1991).
Minn.—[Central Union Trust Co. of New York v. Blank](#), 168 Minn. 312, 210 N.W. 34 (1926).
- 5 N.H.—[Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Association](#), 159 N.H. 627, 992 A.2d 624 (2010).
- 6 U.S.—[American Ass'n of People with Disabilities v. Shelley](#), 324 F. Supp. 2d 1120, 12 A.L.R.6th 885 (C.D. Cal. 2004).

As to the standing of political subdivisions of a state, generally, see § 177.
7 U.S.—[Everglades Drainage Dist. v. Florida Ranch & Dairy Corporation](#), 74 F.2d 914 (C.C.A. 5th Cir. 1935).
Okla.—[Davis v. McCasland](#), 1938 OK 28, 182 Okla. 49, 75 P.2d 1118 (1938).
8 Ill.—[Great United Mut. Ben. Ass'n v. Palmer](#), 358 Ill. 276, 193 N.E. 146 (1934).
9 Ariz.—[Matter of Estate of Dobert](#), 192 Ariz. 248, 963 P.2d 327 (Ct. App. Div. 1 1998).
10 Colo.—[In re Estate of DeWitt](#), 54 P.3d 849 (Colo. 2002).
Wash.—[Mearns v. Scharbach](#), 103 Wash. App. 498, 12 P.3d 1048 (Div. 3 2000).

Third-party standing

An ex-husband had third-party standing on behalf of his deceased insured ex-wife to claim that retroactive application of a Minnesota statute that operated to disqualify a former spouse as a beneficiary under life insurance policy would have violated the Contracts Clause.

U.S.—[MONY Life Ins. Co. v. Ericson](#), 533 F. Supp. 2d 921 (D. Minn. 2008).

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a. In General

§ 185. Statutes affecting title to realty

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  695

A statute affecting title to realty may be attacked as unconstitutional only by one whose property rights are directly and certainly affected by the statute.

A question as to the constitutionality of a statute affecting the title to real estate may not be raised by those who have no interest in the real estate¹ or by those who are not harmed by the alleged unconstitutional feature of the statute.² Only one whose property is directly and certainly affected by legislation can question its constitutionality.³ Accordingly, one who claims title to realty has standing to challenge a provision under the operation of which the defendant claims title.⁴

On the other hand, where plaintiffs are entitled to recover the land sued for only if a certain statute is constitutional, defendants are entitled to raise the question of constitutionality.⁵ A person is not precluded from complaining against the taking of his or her property without due process of law by the fact that in the particular case due process of law would lead to the same result because he or she has no adequate defense on the merits.⁶

The constitutionality of statutes authorizing the taking of real property for public use may be questioned only by persons having an interest in the realty affected,⁷ who can complain only of those features of the statute that affect them injuriously.⁸

CUMULATIVE SUPPLEMENT

Cases:

Condemnee had standing to file claim against condemner alleging that he was deprived of his property without due process of law, even though condemnee acquired property from minor-grantor, where grantor did not seek to avoid deed, but ratified the deed by affidavit upon reaching the age of majority. [Miss. Const. art. 3, § 14. City of Jackson v. Jordan, 202 So. 3d 199 \(Miss. 2016\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Alameda Conservation Ass'n v. State of Cal., 437 F.2d 1087 \(9th Cir. 1971\)](#).
Fla.—[City of Sebring v. Wolf, 105 Fla. 516, 141 So. 736 \(1932\)](#).
La.—[Theriot v. Caffery, 160 La. 78, 106 So. 700 \(1925\)](#).
Nev.—[Gold Circle Crown Mining Co. v. Getchell, 58 Nev. 288, 76 P.2d 1097 \(1938\)](#).
N.Y.—[Cohen v. City of Rochester, 205 A.D. 428, 199 N.Y.S. 568 \(4th Dep't 1923\)](#).
U.S.—[Aikins v. Kingsbury, 247 U.S. 484, 38 S. Ct. 558, 62 L. Ed. 1226 \(1918\)](#).
Ark.—[Ferguson v. Hudson, 143 Ark. 187, 220 S.W. 306 \(1920\)](#).
Mont.—[State ex rel. Jensen v. District Court of Ninth Judicial Dist. in and for Glacier County, 103 Mont. 461, 64 P.2d 835 \(1936\)](#).
- 2 Cal.—[Vesper v. Forest Lawn Cemetery Ass'n, 20 Cal. App. 2d 157, 67 P.2d 368 \(3d Dist. 1937\)](#).
Ownership of road
There was no evidence that a property owner owned an interest in a gravel road that ran along the eastern edge of his property as required to challenge the constitutionality of a statute that governed when a road becomes legally established or abandoned.
Mo.—[Brehm v. Bacon Tp., 426 S.W.3d 1 \(Mo. 2014\)](#).
Me.—[Franklin Property Trust v. Foresite, Inc., 438 A.2d 218 \(Me. 1981\)](#).
Tenn.—[McCamey v. Cummings, 130 Tenn. 494, 172 S.W. 311 \(1914\)](#).
U.S.—[Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S. Ct. 625, 59 L. Ed. 1027 \(1915\)](#).
U.S.—[U.S. v. Haddon, 550 F.2d 677 \(1st Cir. 1977\); Smart v. Texas Power & Light Co., 525 F.2d 1211 \(5th Cir. 1976\)](#).
Ark.—[Connor v. Blackwood, 176 Ark. 139, 2 S.W.2d 44 \(1928\)](#).
Haw.—[Wilson v. Stainback, 39 Haw. 67, 1951 WL 7072 \(1951\)](#).
N.C.—[Yarborough v. North Carolina Park Commission, 196 N.C. 284, 145 S.E. 563 \(1928\)](#).
Tenn.—[Baker v. Donegan, 164 Tenn. 625, 47 S.W.2d 1095 \(1932\), aff'd, 164 Tenn. 625, 52 S.W.2d 152 \(1932\)](#).
U.S.—[Louisville & N.R. Co. v. Western Union Telegraph Co., 249 F. 385 \(C.C.A. 6th Cir. 1918\)](#).
Colo.—[Post Printing & Publishing Co. v. City & County of Denver, 68 Colo. 50, 189 P. 39 \(1920\)](#).
Ga.—[Pye v. State Highway Dept., 226 Ga. 389, 175 S.E.2d 510 \(1970\)](#).
N.J.—[City of Burlington v. Pennsylvania R. Co., 104 N.J.L. 649, 142 A. 23 \(N.J. Ct. Err. & App. 1928\)](#).
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b. Criminal Proceedings

§ 186. Challenging laws or governmental actions or policies in criminal proceedings, generally

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  699, 739, 769, 799, 829, 859, 889

In criminal prosecutions, the defendant has the right to assert the invalidity of the law, regulation, or rule under which he or she is being prosecuted provided he or she shows that his or her rights are adversely affected by it.

As a general rule, in criminal prosecutions, the defendant has the right to assert the invalidity of the law, regulation, or rule under which he or she is being prosecuted.¹ The defendant may also challenge the validity of a statute, practice, or policy which is involved in the course of the criminal prosecution² even if the policy challenged is unwritten.³ The defendant must show that his or her rights are adversely affected by the statute, ordinance, or practice being challenged, whether or not it is the basis for the prosecution, and such a showing is sufficient to support standing.⁴

The accused may challenge only the statute under which he or she is being charged, or a statute or practice which otherwise affects him or her, and not another statute or practice which does not apply to him or her.⁵ A defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another,

collateral statute which is irrelevant to the prosecution.⁶ The defendant must show that he or she is affected by the particular feature of the statute alleged to be unconstitutional.⁷ A defendant affected by one portion of a statute may not plead the invalidity of another portion of the same statute not applicable to his or her case⁸ where the invalidity of the portion questioned will not render void the entire act or at least some provision that does affect the defendant adversely.⁹ Thus, a criminal defendant cannot challenge the constitutionality of one subsection of a statute where he or she was charged under a different subsection.¹⁰ However, the defendant may challenge the statute where the invalidity of the portion questioned would render the entire act, or some provision affecting him or her, void.¹¹

A defendant may not question the constitutionality of a provision in a statute, the operation of which is entirely in his or her own interest.¹² One charged with a statutory violation may not question its constitutionality where the evidence fails to show a violation of the statute,¹³ where he or she is acquitted,¹⁴ or where the charges are dismissed.¹⁵

Right to public trial.

Persons other than the defendant may invoke the right to a public trial under the First Amendment.¹⁶ Although the Sixth Amendment right to a public trial is the right of the accused, a member of the public can invoke the right to a public trial under the First Amendment.¹⁷

Crime victims.

Crime victims have standing to challenge allegedly discriminatory prosecutorial conduct only if those victims have a constitutional right to the nondiscriminatory prosecution of crime such that its deprivation constitutes an injury-in-fact.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

State marijuana registry cardholder had standing to challenge the constitutionality of provision of federal Gun Control Act, prohibiting sales of firearms to individuals whom sellers had reasonable cause to believe were drug users, accompanying regulation, and administrative policy effectively criminalizing the possession of a firearm by the holder of a state marijuana registry card, where cardholder alleged that she held a valid state marijuana registry card, and that the provision of the Act, the regulation, and the policy prevented her from purchasing a firearm. [18 U.S.C.A. § 922\(d\)\(3\); 27 C.F.R. § 478.11. Wilson v. Lynch, 835 F.3d 1083 \(9th Cir. 2016\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Baird v. Eisenstadt, 429 F.2d 1398 \(1st Cir. 1970\), judgment aff'd, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 \(1972\); U.S. v. Burroughs, 564 F.2d 1111 \(4th Cir. 1977\)](#) (disavowed on other grounds by, [U.S. v. Steed, 674 F.2d 284, 10 Fed. R. Evid. Serv. 147 \(4th Cir. 1982\)](#)).
- Cal.—[People v. Barksdale, 8 Cal. 3d 320, 105 Cal. Rptr. 1, 503 P.2d 257 \(1972\)](#).
- Colo.—[Aguilar v. People, 886 P.2d 725 \(Colo. 1994\)](#).
- Idaho—[State v. Cantrell, 94 Idaho 653, 496 P.2d 276 \(1972\)](#).

- Ind.—[Rhim v. State](#), 264 Ind. 682, 348 N.E.2d 620 (1976).
Iowa—[State v. Dalton](#), 674 N.W.2d 111 (Iowa 2004).
Me.—[State v. S. S. Kresge, Inc.](#), 364 A.2d 868 (Me. 1976).
Md.—[Hughes v. State](#), 14 Md. App. 497, 287 A.2d 299 (1972).
Minn.—[Matter of Welfare of S. L. J.](#), 263 N.W.2d 412 (Minn. 1978).
N.Y.—[People v. J. W. Productions](#), 98 Misc. 2d 67, 413 N.Y.S.2d 552 (N.Y. City Crim. Ct. 1979).
N.D.—[State v. Carpenter](#), 301 N.W.2d 106, 16 A.L.R.4th 622 (N.D. 1980).

As to challenges to criminal statutes on the ground of vagueness or overbreadth, see § 165.

As defense

- Alaska—[State v. Hebert](#), 803 P.2d 863 (Alaska 1990).

Hypothetical application of statute

A convicted sex offender who did not assert that the Sexually Violent Predators Act did not apply to his conduct was precluded from asserting a facial challenge based on a hypothetical application.

- Va.—[Shivaee v. Com.](#), 270 Va. 112, 613 S.E.2d 570 (2005).

- 2 U.S.—[Berger v. State of N.Y.](#), 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967); [U.S. v. Tortorello](#), 480 F.2d 764 (2d Cir. 1973).

- Fla.—[Arnett v. State](#), 397 So. 2d 330 (Fla. 1st DCA 1981).

- N.C.—[State v. Mems](#), 281 N.C. 658, 190 S.E.2d 164 (1972).

- Utah—[State v. Herrera](#), 895 P.2d 359 (Utah 1995).

- 3 Va.—[Com. v. Hicks](#), 264 Va. 48, 563 S.E.2d 674 (2002), judgment rev'd on other grounds, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

- 4 U.S.—[Groppi v. Wisconsin](#), 400 U.S. 505, 91 S. Ct. 490, 27 L. Ed. 2d 571 (1971).

- Colo.—[People v. Fite](#), 627 P.2d 761 (Colo. 1981).

- D.C.—[Smith v. District of Columbia](#), 436 A.2d 53 (D.C. 1981).

- Fla.—[Griffin v. State](#), 396 So. 2d 152, 21 A.L.R.4th 225 (Fla. 1981).

- Idaho—[State v. Goodrick](#), 102 Idaho 811, 641 P.2d 998 (1982).

- Iowa—[State v. Gates](#), 306 N.W.2d 720 (Iowa 1981).

- La.—[State v. McMahon](#), 391 So. 2d 1120 (La. 1980).

- Mich.—[People v. Grenke](#), 112 Mich. App. 567, 316 N.W.2d 494 (1982).

- Mo.—[Westmoreland v. State](#), 594 S.W.2d 596 (Mo. 1980).

- Mont.—[Palmer v. State](#), 191 Mont. 534, 625 P.2d 550 (1981).

- S.C.—[State v. Hogg](#), 276 S.C. 226, 277 S.E.2d 592 (1981).

- 5 Ala.—[Bland v. State](#), 395 So. 2d 164 (Ala. Crim. App. 1981).

- Colo.—[People v. Taylor](#), 190 Colo. 144, 544 P.2d 392 (1975).

- Del.—[State v. J. K.](#), 383 A.2d 283 (Del. 1977).

- Ill.—[People v. Pierce](#), 50 Ill. App. 3d 525, 8 Ill. Dec. 602, 365 N.E.2d 988 (1st Dist. 1977).

- Me.—[State v. Niemszyk](#), 303 A.2d 105 (Me. 1973).

- Mich.—[People v. Crawford](#), 89 Mich. App. 30, 279 N.W.2d 560 (1979).

- Mont.—[State v. Kirkland](#), 184 Mont. 229, 602 P.2d 586 (1979).

- N.M.—[State v. Bojorquez](#), 88 N.M. 154, 1975-NMCA-075, 538 P.2d 796 (Ct. App. 1975).

- N.Y.—[People v. Di Raffaele](#), 55 N.Y.2d 234, 448 N.Y.S.2d 448, 433 N.E.2d 513 (1982).

- Tenn.—[Rudd v. State](#), 497 S.W.2d 746 (Tenn. Crim. App. 1973).

- Tex.—[Matchett v. State](#), 941 S.W.2d 922 (Tex. Crim. App. 1996).

- W. Va.—[Moore v. McKenzie](#), 160 W. Va. 511, 236 S.E.2d 342 (1977).

- Wyo.—[Cosco v. State](#), 503 P.2d 1403 (Wyo. 1972).

Forfeiture

Defendants lacked standing to challenge the constitutionality of the forfeiture section of a state statute because all evidence admitted at the trial was seized under the authority of search warrants, not pursuant to the statute.

- U.S.—[Waller v. Georgia](#), 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

- 6 Neb.—[State v. Harris](#), 284 Neb. 214, 817 N.W.2d 258 (2012).

- 7 Ala.—[State v. Wilkerson](#), 54 Ala. App. 104, 305 So. 2d 378 (Crim. App. 1974).

- Ariz.—[State v. Varela](#), 120 Ariz. 596, 587 P.2d 1173 (1978).

- Ill.—[People v. Siefke](#), 97 Ill. App. 3d 14, 52 Ill. Dec. 208, 421 N.E.2d 1071 (2d Dist. 1981).

- 8 Md.—[Hughes v. State](#), 14 Md. App. 497, 287 A.2d 299 (1972).
Okla.—[Dennis v. State](#), 1977 OK CR 83, 561 P.2d 88 (Okla. Crim. App. 1977).
U.S.—[U.S. v. Fiore](#), 434 F.2d 966 (1st Cir. 1970); [U.S. v. Matthews](#), 438 F.2d 715 (5th Cir. 1971); [U.S. v. Warin](#), 530 F.2d 103, 37 A.L.R. Fed. 687 (6th Cir. 1976).
Ariz.—[Wortham v. City of Tucson](#), 128 Ariz. 137, 624 P.2d 334 (Ct. App. Div. 2 1980).
Colo.—[People v. Wimer](#), 197 Colo. 191, 591 P.2d 87 (1979).
Del.—[Hindt v. State](#), 421 A.2d 1325 (Del. 1980).
Fla.—[Greenway v. State](#), 413 So. 2d 23 (Fla. 1982).
Ga.—[Hall v. State](#), 244 Ga. 86, 259 S.E.2d 41 (1979).
Ill.—[People v. Fix](#), 44 Ill. App. 3d 607, 3 Ill. Dec. 328, 358 N.E.2d 726 (3d Dist. 1976).
Iowa—[State v. Henderson](#), 269 N.W.2d 404 (Iowa 1978).
La.—[State v. Turner](#), 392 So. 2d 436 (La. 1980).
Mich.—[People v. Swearington](#), 84 Mich. App. 372, 269 N.W.2d 467 (1978).
Mont.—[State v. Azure](#), 181 Mont. 47, 591 P.2d 1125 (1979).
Neb.—[State v. Meredith](#), 208 Neb. 637, 304 N.W.2d 926 (1981).
Nev.—[Dinitz v. Christensen](#), 94 Nev. 230, 577 P.2d 873 (1978).
N.M.—[State v. Coe](#), 92 N.M. 320, 1978-NMCA-108, 587 P.2d 973 (Ct. App. 1978) (overruled on other grounds by, [Santillanes v. State](#), 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358 (1993)).
Okla.—[Cantrell v. State](#), 1977 OK CR 100, 561 P.2d 973 (Okla. Crim. App. 1977).
Tex.—[Mouton v. State](#), 627 S.W.2d 765 (Tex. App. Houston 1st Dist. 1981).
9 Cal.—[People v. Williams](#), 247 Cal. App. 2d 169, 55 Cal. Rptr. 434 (4th Dist. 1966).
La.—[Hughes v. State](#), 14 Md. App. 497, 287 A.2d 299 (1972).
N.J.—[State v. W. U. Tel. Co.](#), 13 N.J. Super. 172, 80 A.2d 342 (County Ct. 1951).
Okla.—[Cantrell v. State](#), 1977 OK CR 100, 561 P.2d 973 (Okla. Crim. App. 1977).
10 Haw.—[State v. Armitage](#), 132 Haw. 36, 319 P.3d 1044 (2014).
11 Ill.—[People v. Tellery](#), 87 Ill. App. 3d 298, 42 Ill. Dec. 537, 409 N.E.2d 32 (1st Dist. 1980).
Wis.—[State v. Mertes](#), 60 Wis. 2d 414, 210 N.W.2d 741 (1973).
12 Conn.—[State v. Donahue](#), 141 Conn. 656, 109 A.2d 364 (1954).
La.—[State v. Thrift Oil & Gas Co.](#), 162 La. 165, 110 So. 188, 51 A.L.R. 261 (1926).
Minn.—[State v. Meyer](#), 228 Minn. 286, 37 N.W.2d 3 (1949).
Tenn.—[Frazier v. Lindsey](#), 162 Tenn. 228, 36 S.W.2d 436 (1931).
13 La.—[State v. Guidry](#), 364 So. 2d 589 (La. 1978).
14 Colo.—[People v. Tumbarello](#), 623 P.2d 46 (Colo. 1981).
Mont.—[State v. Blinzler](#), 183 Mont. 300, 599 P.2d 349 (1979).
15 D.C.—[Dash v. Mitchell](#), 356 F. Supp. 1292 (D.D.C. 1972).
N.M.—[State v. Herrod](#), 84 N.M. 418, 1972-NMCA-163, 504 P.2d 26 (Ct. App. 1972).
Pa.—[Com. v. Kuykendall](#), 231 Pa. Super. 457, 331 A.2d 686 (1974).
16 Wis.—[State v. Pinno](#), 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207 (2014).
17 Mich.—[People v. Vaughn](#), 491 Mich. 642, 821 N.W.2d 288 (2012).
18 U.S.—[Parkhurst v. Tabor](#), 569 F.3d 861 (8th Cir. 2009).

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§ 187. Jury selection

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  699, 889

A criminal defendant may assert the constitutional rights of a person excluded from his or her jury on the basis of race or gender.

A criminal defendant has standing to raise an equal protection¹ or due process² challenge of a jury panelist excluded on the basis of race through a peremptory challenge whether or not the defendant and the excluded jurors share the same race.³ Similarly, a male defendant may raise an equal protection claim on behalf of female jury panelists excluded from the jury through the State's gender-based use of peremptory challenges,⁴ and a defendant may assert the equal protection rights of a juror excused solely because of his or her lack of English proficiency.⁵ Moreover, the government has standing to object to a defendant's discriminatory peremptory challenge to a venireperson by asserting the equal protection rights of the venireperson sought to be excluded.⁶

However, a defendant lacks standing to assert an equal protection challenge to the exclusion from a jury or grand jury of a member of a religious group to which the defendant does not belong.⁷ A defendant may not assert the equal protection rights of potential jurors excluded by his or her own attorney's race-based peremptory strikes.⁸

A defendant lacks standing to challenge the constitutionality of a statute permitting challenges for cause where no prospective juror was disqualified on the basis in question.⁹

CUMULATIVE SUPPLEMENT

Cases:

A defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races. U.S. Const. Amend. 14. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 N.C.—*State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993).
Tex.—*Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999).
- 2 U.S.—*Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551, 172 A.L.R. Fed. 597 (1998).
- 3 U.S.—*Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551, 172 A.L.R. Fed. 597 (1998).
Colo.—*People v. Cerrone*, 854 P.2d 178 (Colo. 1993).
Conn.—*State v. Gibbs*, 254 Conn. 578, 758 A.2d 327 (2000).
La.—*State v. Duncan*, 802 So. 2d 533 (La. 2001).
Tex.—*Mead v. State*, 819 S.W.2d 869 (Tex. Crim. App. 1991).
- 4 **Jury districting**
A defendant tried pursuant to an unconstitutional jury districting system which tended to deny equal protection to black defendants had standing to raise the issue and was entitled to reversal of a conviction even though the defendant was white.
Fla.—*Craig v. State*, 583 So. 2d 1018 (Fla. 1991).
Wash.—*State v. Burch*, 65 Wash. App. 828, 830 P.2d 357 (Div. 1 1992).
- 5 N.M.—*State v. Singleton*, 130 N.M. 583, 2001-NMCA-054, 28 P.3d 1124 (Ct. App. 2001).
- 6 U.S.—*Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).
Fla.—*State v. Aldret*, 606 So. 2d 1156 (Fla. 1992).
Mo.—*State ex rel. Riederer v. Coburn*, 830 S.W.2d 427 (Mo. Ct. App. W.D. 1991).
N.Y.—*People v. Kern*, 75 N.Y.2d 638, 555 N.Y.S.2d 647, 554 N.E.2d 1235 (1990).
Oklahoma.—*Ezell v. State*, 1995 OK CR 71, 909 P.2d 68 (Okla. Crim. App. 1995).
Tex.—*Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999).
- 7 Conn.—*State v. Couture*, 218 Conn. 309, 589 A.2d 343 (1991) (a defendant who was not Jewish could not assert a violation of equal protection rights in the selection of a jury on the grounds that the first day of selection was Passover, a day on which religiously observant Jews would not serve).
- 8 **Old Order Amish**
Ohio—*State v. Fulton*, 57 Ohio St. 3d 120, 566 N.E.2d 1195 (1991).
Cal.—*People v. Morris*, 107 Cal. App. 4th 402, 131 Cal. Rptr. 2d 872 (2d Dist. 2003).
- 9 Tex.—*DeBlanc v. State*, 799 S.W.2d 701 (Tex. Crim. App. 1990).

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§ 188. Sentence and punishment; conditions of confinement

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  700, 701, 740, 741, 770, 771, 800, 801, 830, 831, 860, 861, 890, 891, 920, 921

A person convicted of a criminal offense has standing to challenge the constitutionality of the procedure involved in his or her sentence and of the conditions of his or her confinement.

A defendant who has been charged with violating a criminal statute may contest the constitutionality of the sentence authorized by the statute as facially excessive.¹ Likewise, a person convicted of a criminal offense generally has standing to challenge the constitutionality of the statutory procedure involved in the sentence or punishment relating to such person's case, as well as the conditions of his or her confinement,² provided his or her rights are adversely affected by it.³ A defendant lacks standing where the practice, policy, or statute in question is inapplicable to his or her situation.⁴ Thus, one who is not sentenced to death has no standing to object to the constitutionality of the death penalty,⁵ and one death row inmate does not have sufficient standing, either individually or as next friend, to challenge a state's authority to carry out the death sentence imposed on another capital defendant without first conducting the mandatory appellate review of the conviction and sentence which had been waived by the

other defendant.⁶ However, a defendant may challenge the penalty range of an offense with which he or she has been charged even if he or she has not yet been convicted.⁷

A defendant may not appeal from his or her sentence on the ground that the sentencing statute is unconstitutional because it allows the admission of hearsay evidence where no hearsay evidence was introduced at his or her sentencing hearing.⁸

CUMULATIVE SUPPLEMENT

Cases:

Defendant in capital murder prosecution lacked standing to challenge constitutionality of statute governing intentional and premeditated murder of a law enforcement officer on the ground that statute's definition of capital murder violated Eighth and Fourteenth Amendments to federal constitution and state constitution because it failed to limit offense to situations in which law enforcement officer was killed while performing duties of a law enforcement officer, where it was undisputed that victim was performing duties of law enforcement officer when he was killed. [U.S. Const. Amends. 8, 14](#); Kan. Const. Bill of Rts. § 9; [Kan. Stat. Ann. § 21-3439\(a\)\(5\)](#). [State v. Cheever](#), 402 P.3d 1126 (Kan. 2017), petition for certiorari filed (U.S. Oct. 2, 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 La.—[State v. Baxley](#), 656 So. 2d 973 (La. 1995).
- 2 U.S.—[Jellum v. Cupp](#), 475 F.2d 829 (9th Cir. 1973).
- 3 Fla.—[State v. Benitez](#), 395 So. 2d 514 (Fla. 1981).
U.S.—[Putt v. Clark](#), 297 F. Supp. 27 (N.D. Ga. 1969).
Fla.—[Francois v. State](#), 407 So. 2d 885 (Fla. 1981).
Ill.—[People v. Patterson](#), 17 Ill. App. 3d 970, 309 N.E.2d 72 (3d Dist. 1974).
La.—[State v. Ramsey](#), 292 So. 2d 708 (La. 1974).
Nev.—[Pacheco v. Warden](#), Nev. State Prison, 87 Nev. 231, 484 P.2d 1082 (1971).
N.H.—[Breest v. Helgemoe](#), 117 N.H. 40, 369 A.2d 612 (1977).
Tenn.—[Becton v. State](#), 506 S.W.2d 137 (Tenn. 1974).
Wash.—[State v. McCarter](#), 91 Wash. 2d 249, 588 P.2d 745 (1978) (overruled on other grounds by, [Matter of McLaughlin](#), 100 Wash. 2d 832, 676 P.2d 444 (1984)).
- 4 U.S.—[U.S. v. Dancis](#), 406 F.2d 729 (2d Cir. 1969); [Swift v. U.S.](#), 436 F.2d 390 (8th Cir. 1970).
Ala.—[Beasley v. State](#), 408 So. 2d 173 (Ala. Crim. App. 1981), writ denied, 408 So. 2d 180 (Ala. 1982).
Ark.—[Williams v. State](#), 260 Ark. 457, 541 S.W.2d 300 (1976).
Cal.—[People v. Dominguez](#), 121 Cal. App. 3d 481, 175 Cal. Rptr. 445 (5th Dist. 1981).
Ga.—[King v. State](#), 265 Ga. 440, 458 S.E.2d 98 (1995).
Iowa—[State v. Wilson](#), 314 N.W.2d 408 (Iowa 1982).
La.—[State v. Sonnier](#), 379 So. 2d 1336 (La. 1979).
Mich.—[People v. Jackson](#), 80 Mich. App. 244, 263 N.W.2d 44 (1977).
Mo.—[State v. Valentine](#), 584 S.W.2d 92 (Mo. 1979) (disapproved of on other grounds by, [Sours v. State](#), 593 S.W.2d 208 (Mo. 1980)).
N.M.—[State v. Salazar](#), 98 N.M. 70, 1982-NMCA-077, 644 P.2d 1059 (Ct. App. 1982).
N.Y.—[People v. Pereira](#), 26 N.Y.2d 265, 309 N.Y.S.2d 901, 258 N.E.2d 194 (1970).
Oklahoma—[Hopkins v. State](#), 1973 OK CR 40, 506 P.2d 580 (Okla. Crim. App. 1973).
Probation for driving under the influence

A defendant lacked standing to challenge, on constitutional grounds, a statute precluding probation as a sentencing alternative for defendants who commit subsequent driving under the influence (DUI) offense while still participating in criminal proceedings on a prior DUI offense where the statute did not apply to the defendant since he had been sentenced and thus was no longer participating in prior criminal proceedings at the time he committed his second DUI offense.

Neb.—[State v. Lamb](#), 280 Neb. 738, 789 N.W.2d 918 (2010).

5

U.S.—[Camacho v. U.S.](#), 407 F.2d 39 (9th Cir. 1969).

Ark.—[Ashley v. State](#), 310 Ark. 575, 840 S.W.2d 793 (1992).

Ill.—[People v. Gangestad](#), 105 Ill. App. 3d 774, 61 Ill. Dec. 486, 434 N.E.2d 841 (2d Dist. 1982).

La.—[State v. Qualls](#), 377 So. 2d 293 (La. 1979).

Mont.—[State v. Kirkland](#), 184 Mont. 229, 602 P.2d 586 (1979).

N.H.—[State v. McPhail](#), 116 N.H. 440, 362 A.2d 199 (1976).

Pa.—[Com. v. Cornish](#), 471 Pa. 256, 370 A.2d 291 (1977).

Tex.—[Eubanks v. State](#), 635 S.W.2d 568 (Tex. App. Houston 1st Dist. 1982).

Wyo.—[Alberts v. State](#), 642 P.2d 447 (Wyo. 1982).

Retrial of penalty phase

A defendant subjected to one penalty phase retrial following a mistrial in his capital murder prosecution lacked standing to challenge the state capital sentencing statutes as unconstitutional for permitting two retrials after a guilty verdict.

Ariz.—[State v. Reeves](#), 233 Ariz. 182, 310 P.3d 970 (2013), cert. denied, 134 S. Ct. 1765, 188 L. Ed. 2d 599 (2014).

Aggravating circumstance

A defendant lacked standing to challenge, on appeal, as allegedly being unconstitutionally vague and overbroad and therefore violating due process, the aggravating circumstance, at the penalty phase of a capital murder trial, that the murder was especially heinous, atrocious, or cruel where the State never attempted to invoke such aggravating circumstance in the defendant's capital murder case, and the jury never addressed it.

Tenn.—[State v. Banks](#), 271 S.W.3d 90 (Tenn. 2008).

6

U.S.—[Whitmore v. Arkansas](#), 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990).

Ark.—[Nooner v. State](#), 322 Ark. 87, 907 S.W.2d 677 (1995).

7

La.—[State v. Interiano](#), 868 So. 2d 9 (La. 2004).

8

Tenn.—[State v. Pritchett](#), 621 S.W.2d 127 (Tenn. 1981).

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§ 189. Rights of third parties

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  667, 699, 739, 769, 799, 829, 859, 889, 919

Subject to some exceptions, a criminal defendant has standing to challenge a statute only as it applies to him or her, and it is not sufficient that the statute may impair the rights of others.

A criminal defendant has standing to challenge the statute under which he or she is being prosecuted only as it applies to him or her,¹ and it is not sufficient that the statute may impair the rights of others,² including an alleged accomplice,³ coconspirator,⁴ or codefendant.⁵

A person who has received fair warning of the criminality of his or her own conduct, or whose conduct clearly is within the comprehension of the statute, cannot attack a statute because it may be vague as applied to others or in other situations.⁶ Furthermore, a defendant does not have standing to assert the overbreadth of a statute under which he or she was convicted when the statute clearly reaches his or her conduct.⁷ Facial challenges to criminal statutes on overbreadth grounds are discouraged as they call for relaxing the requirements of standing to allow a determination that the law would be unconstitutionally applied

to different parties and different circumstances from those at hand,⁸ and a party may generally make only an "as applied" void-for-vagueness challenge to a statute unless the challenge involves First Amendment rights.⁹ In some cases, however, a criminal defendant may make a facial overbreadth challenge to a statute if he or she argues that the statute improperly prohibits a substantial amount of constitutionally protected conduct, whether or not its application to his or her own conduct may be constitutional,¹⁰ and a defendant charged¹¹ or convicted¹² under a statute has standing to challenge the statute as facially overbroad.

Because Sixth Amendment and Fifth Amendment rights are personal, they cannot be invoked by another party.¹³ However, although the Sixth Amendment right to a public trial is the right of the accused, a member of the public can invoke the right to a public trial under the First Amendment.¹⁴

Exceptions to the general rules against the assertion of third-party rights¹⁵ may afford standing in criminal prosecutions where they are applicable¹⁶ but not otherwise.¹⁷ Thus, standing may be allowed where the rights of others cannot otherwise be raised and protected¹⁸ as where the rights of such others are likely to be diluted or adversely affected unless they are considered in a proceeding involving another person.¹⁹ Also, standing has been accorded where First Amendment rights are involved and the statute purports to regulate or proscribe those rights in a manner which has a chilling effect on the conduct of other persons.²⁰

It has been held that an adult defendant has no standing to challenge a criminal statute dealing with the exploitation of minors based on how the statute affects minors' right to privacy and alleged right to engage in sexual activity.²¹ It has also been held, however, that a defendant has standing to assert victims' privacy rights and attack the constitutionality of a statutory rape provision.²²

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Footnotes

- ¹ § 186.
- ² U.S.—*Brache v. Westchester County*, 658 F.2d 47 (2d Cir. 1981); U.S. v. Meacham, 626 F.2d 503, 7 Fed. R. Evid. Serv. 1038 (5th Cir. 1980).
Fla.—*State v. Hunter*, 586 So. 2d 319 (Fla. 1991).
Ill.—*People v. Garrison*, 82 Ill. 2d 444, 45 Ill. Dec. 132, 412 N.E.2d 483 (1980).
R.I.—*State v. DePasquale*, 413 A.2d 101 (R.I. 1980).
- ³ Ark.—*Burkhart v. State*, 301 Ark. 543, 785 S.W.2d 460 (1990).
Mo.—*State v. Light*, 484 S.W.2d 275 (Mo. 1972).
- ⁴ Nev.—*Greene v. State*, 113 Nev. 157, 931 P.2d 54 (1997).
- ⁵ Mass.—*Com. v. Bernard*, 6 Mass. App. Ct. 499, 378 N.E.2d 696 (1978), judgment aff'd, 378 Mass. 24, 389 N.E.2d 395 (1979).
R.I.—*State v. Valenti*, 772 A.2d 127 (R.I. 2001).
- ⁶ § 165.
- ⁷ Colo.—*People v. Bridges*, 620 P.2d 1 (Colo. 1980).
Fla.—*Clark v. State*, 395 So. 2d 525 (Fla. 1981).
Mich.—*People v. Lynch*, 410 Mich. 343, 301 N.W.2d 796 (1981).
N.C.—*State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981).
S.C.—*State v. Smith*, 275 S.C. 164, 268 S.E.2d 276 (1980).
- ⁸ U.S.—*Sabri v. U.S.*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891, 5 A.L.R. Fed. 2d 821 (2004).
- ⁹ Wash.—*State v. Groom*, 133 Wash. 2d 679, 947 P.2d 240 (1997).
As to facial challenges brought on First Amendment grounds, see § 169.
- ¹⁰ Cal.—*Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995).

La.—[State v. Sandifer](#), 679 So. 2d 1324 (La. 1996).

11 Iowa—[State v. Dalton](#), 674 N.W.2d 111 (Iowa 2004).

12 Colo.—[Aguilar v. People](#), 886 P.2d 725 (Colo. 1994).

13 Pa.—[Com. v. Hall](#), 549 Pa. 269, 701 A.2d 190 (1997).

Fifth Amendment

D.C.—[Bright v. U.S.](#), 698 A.2d 450 (D.C. 1997).

Right to counsel

Cal.—[People v. Badgett](#), 10 Cal. 4th 330, 41 Cal. Rptr. 2d 635, 895 P.2d 877 (1995).

14 § 186.

15 Discussed in §§ 166 to 169.

16 N.J.—[State v. Saunders](#), 75 N.J. 200, 381 A.2d 333 (1977).

17 U.S.—[F. X. Maltz, Ltd. v. Morgenthau](#), 556 F.2d 123 (2d Cir. 1977).

Ariz.—[State v. Powers](#), 117 Ariz. 220, 571 P.2d 1016 (1977).

Idaho—[State v. Goodrick](#), 102 Idaho 811, 641 P.2d 998 (1982).

Ill.—[People v. Lenhart](#), 90 Ill. App. 3d 502, 45 Ill. Dec. 887, 413 N.E.2d 220 (3d Dist. 1980).

Mass.—[Com. v. Bruneau](#), 7 Mass. App. Ct. 858, 386 N.E.2d 29 (1979).

18 U.S.—[Eisenstadt v. Baird](#), 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

Ariz.—[State v. Bateman](#), 113 Ariz. 107, 547 P.2d 6 (1976).

19 U.S.—[Eisenstadt v. Baird](#), 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); [Griswold v. Connecticut](#), 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Physician and patient

Pursuant to the test for third-party standing, physicians could assert rights of their minor patients in challenging the application of a Kansas statute requiring doctors, teachers, and others to notify the state government of a suspected injury to a minor resulting from sexual abuse in the context of voluntary sex between minors of similar ages believed not to cause harm, inasmuch as the physicians' interests aligned with those of their minor patients, such that they could provide proper representation of the patients' rights, and the patients faced a genuine obstacle to asserting their own claims in light of their interests in maintaining the privacy of their sexual activities, their status as minors, and the possible fear of reprisal from parents.

U.S.—[Aid for Women v. Foulston](#), 441 F.3d 1101 (10th Cir. 2006)

20 Ariz.—[State v. Gates](#), 118 Ariz. 357, 576 P.2d 1357 (1978).

Cal.—[Ghafari v. Municipal Court](#), 87 Cal. App. 3d 255, 150 Cal. Rptr. 813, 2 A.L.R.4th 1230 (1st Dist. 1978).

Colo.—[People v. Bridges](#), 620 P.2d 1 (Colo. 1980).

La.—[State v. Sandifer](#), 679 So. 2d 1324 (La. 1996).

N.Y.—[People v. Duryea](#), 76 Misc. 2d 948, 351 N.Y.S.2d 978 (Sup 1974), order aff'd, 44 A.D.2d 663, 354 N.Y.S.2d 129 (1st Dep't 1974).

Va.—[Owens v. Com.](#), 211 Va. 633, 179 S.E.2d 477 (1971).

21 Wash.—[State v. Farmer](#), 116 Wash. 2d 414, 805 P.2d 200, 13 A.L.R.5th 1070 (1991), amended on other grounds on denial of reconsideration, 812 P.2d 858 (Wash. 1991).

22 Fla.—[Jones v. State](#), 640 So. 2d 1084 (Fla. 1994).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

4. Particular Types of Laws or Governmental Actions or Policies Challenged

b. Criminal Proceedings

§ 190. Persons subject to possible prosecution

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  699, 739, 769, 799, 829, 859, 889, 919

Persons who are not being prosecuted but are faced with a credible threat of prosecution may challenge the constitutionality of a statute proscribing their intended conduct.

It is not necessary that one contesting the constitutionality of a criminal statute first expose himself or herself to actual arrest or prosecution to be entitled to challenge the statute that such person claims deters the exercise of his or her constitutional rights.¹ A plaintiff satisfies the injury-in-fact requirement for Article III standing where he or she alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.² It is sufficient that there is a realistic danger of sustaining a direct injury as a result of the operation or enforcement of the statute.³ The injury may be any threat of personal detriment,⁴ including economic injury,⁵ as well as the fear of prosecution itself.⁶ There must be a realistic basis for the defendant's fear of prosecution,⁷ and standing will be denied when fears of prosecution are imaginary or speculative.⁸

Where a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury for purposes of standing as long as it is based on an actual and well-founded fear that the challenged statute will be enforced.⁹

Defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Individual adequately alleged intention to engage in course of conduct arguably affected with constitutional interest, as element of injury conferring Article III standing, in First Amendment context, without requiring individual to undergo criminal prosecution, in individual's action against New Hampshire Attorney General, in his official capacity, raising pre-enforcement due process vagueness challenge to New Hampshire criminal defamation statute; although individual identified no specific statements he intended to make, he intimated that he intended to engage in speech resembling past critiques made by him, which included criticism of law enforcement officers. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amends. 1, 14](#); [N.H. Rev. Stat. Ann. § 644:11](#). *Frese v. MacDonald*, 425 F. Supp. 3d 64, 2019 DNH 184 (D.N.H. 2019).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Babbitt v. United Farm Workers Nat. Union](#), 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979).

Conn.—[State v. Ortiz](#), 83 Conn. App. 142, 848 A.2d 1246 (2004).

N.M.—[American Civil Liberties Union of New Mexico v. City of Albuquerque](#), 1999-NMSC-044, 128 N.M. 315, 992 P.2d 866 (1999).

Wash.—[State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee](#), 135 Wash. 2d 618, 957 P.2d 691 (1998).

2 U.S.—[Susan B. Anthony List v. Driehaus](#), 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

Providing support to foreign terrorist organizations

Preenforcement review of a criminal ban on providing material support to organizations that have been designated as foreign terrorist organizations presented a justiciable case or controversy under Article III; the plaintiffs faced a credible threat of prosecution and would not be required to await and undergo criminal prosecution as the sole means of seeking relief.

U.S.—[Holder v. Humanitarian Law Project](#), 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355, 49 A.L.R. Fed. 2d 567 (2010)

3 U.S.—[Babbitt v. United Farm Workers Nat. Union](#), 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979).

4 U.S.—[Bykofsky v. Borough of Middletown](#), 389 F. Supp. 836 (M.D. Pa. 1975).

5 U.S.—[United Artists Corp. v. Wright](#), 368 F. Supp. 1034 (M.D. Ala. 1974); [Amusement Devices Ass'n v. State of Ohio](#), 443 F. Supp. 1040, 10 Ohio Op. 3d 235 (S.D. Ohio 1977).

Sex offender registration fee

Sex offenders convicted in Wisconsin, but no longer residing in the state, had standing to challenge Wisconsin's sex offender registration requirement as violating the prohibition against states' enacting ex post facto laws even though they did not intend to ever return to the state; the sex offenders had received frequent letters from the Wisconsin Department of Corrections reminding them that they had to comply with the registration requirements for life and that failure to do so was a felony, so there was some danger the sex offenders would be prosecuted if they failed to comply, and the sex offenders' decision to pay the

\$100 annual registration fee was a rational response to the threat and therefore an actual harm caused by the challenged law.

U.S.—[Mueller v. Raemisch](#), 740 F.3d 1128 (7th Cir. 2014).

6 U.S.—[Jones v. Wade](#), 479 F.2d 1176 (5th Cir. 1973); [Anderson v. Nemetz](#), 474 F.2d 814 (9th Cir. 1973).

7 U.S.—[Pent-R-Books, Inc. v. U.S. Postal Service](#), 328 F. Supp. 297, 15 A.L.R. Fed. 464 (E.D. N.Y. 1971); [Hoetzer v. Erie County](#), 497 F. Supp. 1207 (W.D. N.Y. 1980); [Kew v. Senter](#), 416 F. Supp. 1101 (N.D. Tex. 1976).

Animal Enterprise Terrorism Act

Animal rights activists failed to demonstrate a threat of imminent injury, as required for Article III standing to bring a preenforcement First Amendment challenge to the Animal Enterprise Terrorism Act (AETA), which criminalized acts of violence against animal enterprises and persons and entities connected with those enterprises; none of the activists' proposed expressive activity, including participating in peaceful public demonstrations, and advocating, without inciting, illegal conduct by others against animal enterprises, was prohibited by the AETA.

U.S.—[Blum v. Holder](#), 744 F.3d 790 (1st Cir. 2014), cert. denied, [135 S. Ct. 477](#), [190 L. Ed. 2d 358](#) (2014).

Hate crimes statute

Pastors failed to allege that their exercise of their First Amendment right to publicly denounce homosexuality would subject them to any credible threat of prosecution, or even to the threat of investigation or surveillance, for violating the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, as required for the pastors' standing to bring a preenforcement challenge to the Act; pastors alleged only that they had been generally accused by various people and organizations of supporting or promoting violence through their religious messages, but these comments said nothing about how the Act might be applied to pastors by those with the actual authority to implement it.

U.S.—[Glenn v. Holder](#), 690 F.3d 417, 77 A.L.R. Fed. 2d 605 (6th Cir. 2012), cert. denied, [133 S. Ct. 1581](#), [185 L. Ed. 2d 576](#) (2013).

8 U.S.—[Babbitt v. United Farm Workers Nat. Union](#), 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979).

9 U.S.—[Libertarian Party of Los Angeles County v. Bowen](#), 709 F.3d 867 (9th Cir. 2013).

Criminal libel

The student publisher of an Internet-based journal lacked standing to pursue an action against the district attorney and other government officials, challenging Colorado's criminal libel statute as violative of the First Amendment right of free expression; at the time the student filed his original complaint, the police had searched the student's residence and seized his computer and papers, and they were retaining them pending further investigation, but shortly after the complaint was filed and prior to the filing of student's amended complaint, the district attorney expressly disavowed his intent to prosecute the student under the criminal libel statute, no charges were ever filed against the student, and the district attorney publicly announced that he would not prosecute the student so that the student no longer faced any actual or imminent threat of prosecution.

U.S.—[Mink v. Suthers](#), 482 F.3d 1244 (10th Cir. 2007).

10 U.S.—[Parkhurst v. Tabor](#), 569 F.3d 861 (8th Cir. 2009), holding that the biological mother and adoptive father of a minor child did not have standing to bring suit under § 1983 against prosecutors and the county for an alleged violation of the child's right to equal protection based on the decision to forego prosecution of the child's biological father for the sexual assault of the child; the mother and adoptive father did not suffer an injury-in-fact because they were neither prosecuted nor threatened with prosecution.

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

5. Estoppel and Waiver

a. In General

§ 191. Estoppel and waiver as affecting right to assert constitutional right or to challenge law's constitutionality, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 945 to 953

In general, the right to assert a constitutional right or to challenge the constitutionality of a statute may be lost by waiver or estoppel.

Except when expressly prohibited by statute,¹ the right to assert a constitutional right or to challenge the constitutionality of a statute may be lost by waiver or estoppel if the constitutional right or provision involved is one which was made for the benefit or protection of the person as to whom the waiver or estoppel is claimed² and if no considerations of public policy or morals are involved.³ A person may, by his or her acts or omission to act, waive a constitutional right,⁴ including the rights of due process,⁵ access to the courts,⁶ representation by counsel,⁷ jury trial,⁸ confrontation,⁹ presence at critical stages of a criminal trial,¹⁰ the privilege against self-incrimination,¹¹ speedy trial,¹² freedom of speech,¹³ and religious freedom.¹⁴ Rights or provisions intended for the protection of one's property rights may also be lost through waiver or estoppel.¹⁵

Constitutional rights may be waived not only in civil¹⁶ or criminal¹⁷ proceedings but also in courts-martial¹⁸ and attorney disciplinary proceedings.¹⁹

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.²⁰

Conditioning a waiver of a jury trial on the consent of the prosecution does not violate the defendant's constitutional rights.²¹

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Footnotes

1 N.Y.—[Carroll v. Grumet](#), 281 A.D. 35, 117 N.Y.S.2d 553 (1st Dep't 1952).

2 U.S.—[Wilhelm v. Baxter](#), 436 F. Supp. 1322 (S.D. Ill. 1977).

La.—[State v. Williams](#), 353 So. 2d 1299 (La. 1977).

Right to impartial adjudication

As a personal right, Article III's guarantee of impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate procedures by which civil and criminal matters must be tried; however, Article III separation-of-powers principles are not subject to waiver as they serve institutional rather than personal interests.

U.S.—[Commodity Futures Trading Com'n v. Schor](#), 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

3 Ala.—[Lloyd Noland Hosp. v. Durham](#), 906 So. 2d 157 (Ala. 2005).

Fla.—[Hartwell v. Blasingame](#), 564 So. 2d 543 (Fla. 2d DCA 1990), decision approved, 584 So. 2d 6 (Fla. 1991).

Kan.—[Carney v. Carney](#), 1 Kan. App. 2d 544, 571 P.2d 56 (1977).

Minn.—[Bolin v. State, Dept. of Public Safety](#), 313 N.W.2d 381 (Minn. 1981).

N.Y.—[Nishman v. De Marco](#), 76 A.D.2d 360, 430 N.Y.S.2d 339 (2d Dep't 1980).

Tenn.—[State, Dept. of Highways v. Urban Estates, Inc.](#), 225 Tenn. 193, 465 S.W.2d 357 (1971).

4 U.S.—[College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.](#), 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605, 135 Ed. Law Rep. 362 (1999); [U.S. v. Wallace](#), 597 F.3d 794 (6th Cir. 2010).

Alaska—[Willoya v. State, Dept. of Corrections](#), 53 P.3d 1115 (Alaska 2002).

Ark.—[Mayo v. State](#), 336 Ark. 275, 984 S.W.2d 801 (1999).

Fla.—[Lewis v. Moore](#), 753 So. 2d 1242 (Fla. 2000).

Ga.—[Smith v. Miller](#), 261 Ga. 560, 407 S.E.2d 727 (1991).

Haw.—[Domingo v. State](#), 76 Haw. 237, 873 P.2d 775 (1994).

Idaho—[State v. Murphy](#), 125 Idaho 456, 872 P.2d 719 (1994).

Kan.—[State v. Lyons](#), 266 Kan. 591, 973 P.2d 794 (1999).

Ky.—[Com. v. Simmons](#), 394 S.W.3d 903 (Ky. 2013).

Miss.—[Lockett v. State](#), 656 So. 2d 68 (Miss. 1995) (overruled on other grounds by, [Jones v. State](#), 700 So. 2d 631 (Miss. 1997)).

Mo.—[Weiss v. Rojanasathit](#), 975 S.W.2d 113 (Mo. 1998).

Mont.—[State v. Tapson](#), 2001 MT 292, 307 Mont. 428, 41 P.3d 305 (2001).

Neb.—[State v. Kanarick](#), 257 Neb. 358, 598 N.W.2d 430 (1999).

N.M.—[State v. Sanchez](#), 2000-NMSC-021, 129 N.M. 284, 6 P.3d 486 (2000).

N.C.—[Bailey v. State](#), 348 N.C. 130, 500 S.E.2d 54 (1998).

N.D.—[Paulson v. Paulson](#), 2005 ND 72, 694 N.W.2d 681 (N.D. 2005).

N.J.—[Van Duren v. Rzasa-Ormes](#), 394 N.J. Super. 254, 926 A.2d 372 (App. Div. 2007), judgment aff'd, 195 N.J. 230, 948 A.2d 1285 (2008).

Okla.—[Bryson v. State](#), 1994 OK CR 32, 876 P.2d 240 (Okla. Crim. App. 1994).

S.C.—[Sims v. State](#), 313 S.C. 420, 438 S.E.2d 253 (1993).

S.D.—[Witchey v. Leapley](#), 483 N.W.2d 202 (S.D. 1992).

Tenn.—[State v. Blackmon](#), 984 S.W.2d 589 (Tenn. 1998).

Tex.—[Moayedi v. Interstate 35/Chisam Road, L.P.](#), 438 S.W.3d 1 (Tex. 2014).

Utah—[Hall v. NACM Intermountain, Inc.](#), 1999 UT 97, 988 P.2d 942 (Utah 1999).

W. Va.—[State ex rel. Gill v. Irons](#), 207 W. Va. 199, 530 S.E.2d 460 (2000).

Wyo.—[Belden v. State](#), 2003 WY 89, 73 P.3d 1041 (Wyo. 2003).

Separation of powers under state constitution

The separation-of-powers doctrine is not an affirmative defense that can be waived but a command expressly stated in the Alabama Constitution.

Ala.—[State v. Estate of Yarbrough](#), 156 So. 3d 947 (Ala. 2014).

5

Miss.—[Dennis v. Dennis](#), 824 So. 2d 604 (Miss. 2002).

Mo.—[Moore v. Board of Educ. of Fulton Public School No. 58](#), 836 S.W.2d 943, 77 Ed. Law Rep. 1019 (Mo. 1992).

Mont.—[In re E.G.](#), 2014 MT 148, 375 Mont. 252, 326 P.3d 1092 (2014).

Oklahoma—[State ex rel. Oklahoma Bar Ass'n v. Minter](#), 1998 OK 59, 961 P.2d 208 (Okla. 1998), as corrected, (June 12, 1998).

Tex.—[Nolte v. Flournoy](#), 348 S.W.3d 262 (Tex. App. Texarkana 2011).

Utah—[Hall v. NACM Intermountain, Inc.](#), 1999 UT 97, 988 P.2d 942 (Utah 1999).

Wyo.—[Verheydt v. Verheydt](#), 2013 WY 25, 295 P.3d 1245 (Wyo. 2013).

Notice and hearing

(1) The due process right to notice and hearing prior to a civil judgment can be waived, and in turn, a state can enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance.

Ky.—[Department of Revenue, Finance and Admin. Cabinet v. Wade](#), 379 S.W.3d 134 (Ky. 2012)

(2) When a defendant admits a probation violation, he waives any due process claim based upon lack of notice.

Wyo.—[Allaback v. State](#), 2014 WY 27, 318 P.3d 827 (Wyo. 2014).

6

Utah—[Jenkins v. Percival](#), 962 P.2d 796 (Utah 1998).

7

Me.—[State v. Hill](#), 2014 ME 16, 86 A.3d 628 (Me. 2014).

8

Mich.—[People v. Russell](#), 471 Mich. 182, 684 N.W.2d 745 (2004).

9

Idaho—[State v. Murphy](#), 125 Idaho 456, 872 P.2d 719 (1994).

10

Idaho—[State v. Murphy](#), 125 Idaho 456, 872 P.2d 719 (1994).

11

Idaho—[Davis v. State](#), 1999 OK CR 16, 980 P.2d 1111 (Okla. Crim. App. 1999), as corrected, (Apr. 15, 1999).

12

R.I.—[State v. Laperche](#), 617 A.2d 1371 (R.I. 1992).

13

Tex.—[Osterberg v. Peca](#), 12 S.W.3d 31 (Tex. 2000).

14

Me.—[Eastern Maine Medical Center v. Maine Health Care Finance Com'n](#), 632 A.2d 749 (Me. 1993).

15

Mo.—[City of St. Louis v. Butler Co.](#), 358 Mo. 1221, 219 S.W.2d 372 (1949).

16

Vt.—[State v. Malmquist](#), 114 Vt. 96, 40 A.2d 534 (1944).

17

§ 200.

18

§ 202.

19

U.S.—[Marymont v. Joyce](#), 352 F. Supp. 547 (W.D. Ark. 1972).

20

Okla.—[State ex rel. Oklahoma Bar Ass'n v. Minter](#), 1998 OK 59, 961 P.2d 208 (Okla. 1998), as corrected, (June 12, 1998).

21

U.S.—[Singer v. U.S.](#), 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965); [U.S. v. Kelley](#), 539 F.2d 1199 (9th Cir. 1976).

Utah—[State v. Greenwood](#), 2012 UT 48, 297 P.3d 556 (Utah 2012), cert. denied, 133 S. Ct. 1257, 185 L. Ed. 2d 182 (2013).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

5. Estoppel and Waiver

a. In General

§ 192. Types of conduct causing waiver or estoppel

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 945 to 953

Waiver of a constitutional right or the right to challenge the constitutionality of a statute may be effected, or estoppel created, by conduct inconsistent with the exercise of the right as by conduct showing an intention to waive, or rendering it unjust to permit, an exercise of the right.

Waiver of a constitutional right or the right to challenge the constitutionality of a statute may be effected, or estoppel may be created, by deliberate election,¹ by on-the-record waiver,² or by contract.³ Although a written waiver of constitutional rights is not alone sufficient to establish a waiver as knowing, intelligent, and voluntary, it is usually strong proof of its validity.⁴

Waiver or estoppel of a right may also result from failure to assert the right or raise the issue in due time⁵ by failing to raise the issue, or address it adequately, in an appellate brief⁶ or by conduct inconsistent with the assertion or exercise of the right.⁷ This can occur by any course of conduct which shows an intention to waive the right.⁸ For instance, a criminal defendant may waive the right to be present at a critical stage of trial by failing to appear,⁹ and a party to a civil case may waive his or her due

process right to be heard by voluntarily absenting himself or herself from the proceedings¹⁰ or by failing to respond to notice or request a hearing.¹¹ However, if a party is not informed of the availability of a hearing, the party does not waive his or her due process rights by failing to request a hearing,¹² and if a hearing does not comply with due process, the party not afforded a fair hearing does not waive his or her rights by leaving.¹³

A person may also waive a constitutional right by conduct rendering it unjust to permit the assertion of the right.¹⁴ Thus, a party who accepts benefits under a contract may waive the issue of legislative impairment of the party's rights under the contract.¹⁵

It has been held that the State, in granting a privilege, may impose any conditions which seem proper, and the person accepting the privilege is estopped to question the constitutionality of the enactment.¹⁶ However, it has also been held that a criminal defendant cannot be required to surrender one constitutional right in order to assert another¹⁷ and that a state cannot grant a privilege subject to the agreement that the grantee will surrender a constitutional right even in those instances where the State has the unqualified power to withhold the grant altogether.¹⁸

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Footnotes

1 U.S.—[Pierce Oil Corp. v. Phoenix Refining Co.](#), 259 U.S. 125, 42 S. Ct. 440, 66 L. Ed. 855 (1922).

N.M.—[Bolin v. City of Portales](#), 1976-NMSC-020, 89 N.M. 192, 548 P.2d 1210 (1976).

Tenn.—[Holiday v. State](#), 519 S.W.2d 597 (Tenn. Crim. App. 1973).

Tex.—[Bank of North America v. State Banking Bd.](#), 468 S.W.2d 529 (Tex. Civ. App. Austin 1971).

Stipulation

Even if an ex-wife's right to privacy gave her the right to choose where to reside with her family, she waived that right by agreeing to a stipulation that was incorporated into a final divorce decree and that restricted her children's residence to New Hampshire for purposes of her claim that the trial court violated her constitutional right to privacy by denying her petition to relocate with her children to Montana.

N.H.—[Tomasko v. Dubuc](#), 145 N.H. 169, 761 A.2d 407 (2000).

S.C.—[Brown v. State](#), 317 S.C. 270, 453 S.E.2d 251 (1994).

2 U.S.—[Democratic Nat. Committee v. Republican Nat. Committee](#), 673 F.3d 192, 81 Fed. R. Serv. 3d 1125 (3d Cir. 2012), cert. denied, 133 S. Ct. 931, 184 L. Ed. 2d 751 (2013).

Ill.—[Szafranski v. Dunston](#), 2013 IL App (1st) 122975, 373 Ill. Dec. 196, 993 N.E.2d 502 (App. Ct. 1st Dist. 2013), appeal denied, 374 Ill. Dec. 577, 996 N.E.2d 24 (Ill. 2013).

Tex.—[Solar Applications Engineering, Inc. v. T.A. Operating Corp.](#), 327 S.W.3d 104 (Tex. 2010).

Forum selection clause

A party who consents to jurisdiction in a forum selection clause waives any due process claims.

U.S.—[Teran v. GB Intern., S.P.A.](#), 920 F. Supp. 2d 1176 (D. Kan. 2013).

4 Iowa—[State v. Countryman](#), 572 N.W.2d 553 (Iowa 1997).

5 Ky.—[Hatton v. Com.](#), 2004 WL 1908246 (Ky. 2004).

Mo.—[State, Dept. of Social Services, Div. of Child Support Enforcement v. Houston](#), 989 S.W.2d 950 (Mo. 1999).

Time limitations

The State may attach reasonable time limitations to the assertion of Federal Constitutional rights, and a time limitation may be placed on the exercise of a state constitutional right.

Miss.—[Lockett v. State](#), 656 So. 2d 68 (Miss. 1995) (overruled on other grounds by, [Jones v. State](#), 700 So. 2d 631 (Miss. 1997)).

Earliest opportunity

(1) Constitutional issues are waived if not raised at the earliest opportunity.

Mo.—[Smith v. Shaw](#), 159 S.W.3d 830 (Mo. 2005).

Mont.—[In re Custody of Arneson-Nelson](#), 2001 MT 242, 307 Mont. 60, 36 P.3d 874 (2001).

(2) Constitutional question should be raised at earliest opportunity.

Neb.—[State v. One 1985 Mercedes 190D Auto.](#), 247 Neb. 335, 526 N.W.2d 657 (1995).

6 N.H.—[In re Sandra H.](#), 150 N.H. 634, 846 A.2d 513 (2004).

R.I.—[State v. Laperche](#), 617 A.2d 1371 (R.I. 1992).

Utah—[State v. One 1980 Cadillac](#), 2001 UT 26, 21 P.3d 212 (Utah 2001).

7 U.S.—[Pierce Oil Corp. v. Phoenix Refining Co.](#), 259 U.S. 125, 42 S. Ct. 440, 66 L. Ed. 855 (1922).

Alaska—[Matter of C.L.T.](#), 597 P.2d 518 (Alaska 1979).

Ark.—[Hulsey v. State](#), 268 Ark. 312, 595 S.W.2d 934 (1980), opinion supplemented on denial of reh'g, 268 Ark. 312, 599 S.W.2d 729 (1980).

Idaho—[State v. Hightower](#), 101 Idaho 749, 620 P.2d 783 (1980).

Waiver by choosing manner of execution

An inmate sentenced to death waived a claim that execution by lethal gas violated the Eighth Amendment's prohibition of cruel and unusual punishment by choosing to be executed by lethal gas rather than lethal injection where state law provided inmates with the choice of execution by lethal gas or lethal injection and made lethal injection the default form of execution.

U.S.—[Stewart v. LaGrand](#), 526 U.S. 115, 119 S. Ct. 1018, 143 L. Ed. 2d 196 (1999).

Agreement as to admissibility

A defendant in a paternity action, whose counsel had signed an agreement that the results of a blood test would be admissible in evidence, was precluded from challenging the test on the grounds that the statute providing for the admissibility of blood test evidence had been adopted in violation of the separation-of-powers doctrine.

Ark.—[Barnes v. Barnes](#), 311 Ark. 287, 843 S.W.2d 835 (1992).

Acceptance of terms

By accepting the terms and conditions of early release under a control release program, which included the forfeiture of basic and incentive gain time upon revocation of control release, an inmate waived any ex post facto argument as to the forfeiture of such gain time after a violation of control release.

Fla.—[Bowles v. Singletary](#), 698 So. 2d 1201 (Fla. 1997).

8 Cal.—[Journey v. Superior Court](#), 47 Cal. App. 3d 408, 120 Cal. Rptr. 897 (4th Dist. 1975).

Idaho—[State v. Hightower](#), 101 Idaho 749, 620 P.2d 783 (1980).

Ky.—[Rudolph v. Com.](#), 564 S.W.2d 1 (Ky. 1977) (overruled on other grounds by, [Woods v. Com.](#), 793 S.W.2d 809 (Ky. 1990)).

Miss.—[Walker v. Walker](#), 389 So. 2d 502 (Miss. 1980).

Tex.—[Hernandez v. Houston Independent School Dist.](#), 558 S.W.2d 121 (Tex. Civ. App. Austin 1977), writ refused n.r.e., (May 17, 1978).

Agreement to arbitrate

A party may waive his or her right of access to courts by agreeing to arbitration of dispute.

Utah—[Jenkins v. Percival](#), 962 P.2d 796 (Utah 1998).

9 Mont.—[State v. McCarthy](#), 2004 MT 312, 324 Mont. 1, 101 P.3d 288 (2004).

10 Mo.—[Moore v. Board of Educ. of Fulton Public School No. 58](#), 836 S.W.2d 943, 77 Ed. Law Rep. 1019 (Mo. 1992).

Wyo.—[Jones v. Jones](#), 903 P.2d 545 (Wyo. 1995).

11 Md.—[Lomax v. Comptroller of Treasury](#), 88 Md. App. 50, 591 A.2d 1311 (1991).

S.C.—[Zaman v. S.C. State Bd. of Medical Examiners](#), 305 S.C. 281, 408 S.E.2d 213 (1991).

Failure to take steps to receive notice

A party who fails to take the steps necessary for receiving notice waives his or her due process protection and is not entitled to notice.

Utah—[Hall v. NACM Intermountain, Inc.](#), 1999 UT 97, 988 P.2d 942 (Utah 1999).

12 S.D.—[City of Pierre v. Blackwell](#), 2001 SD 127, 635 N.W.2d 581 (S.D. 2001).

13 Mo.—[Moore v. Board of Educ. of Fulton Public School No. 58](#), 836 S.W.2d 943, 77 Ed. Law Rep. 1019 (Mo. 1992).

14 Haw.—[Suesz v. St. Louis-Chaminade Ed. Center](#), 1 Haw. App. 415, 619 P.2d 1104 (1980).

Idaho—[State v. Hightower](#), 101 Idaho 749, 620 P.2d 783 (1980).

15 Kan.—[Board of Educ. of Unified School Dist. No. 443, Ford County v. Kansas State Bd. of Educ.](#), 266 Kan. 75, 966 P.2d 68, 130 Ed. Law Rep. 308 (1998).

- 16 N.C.—[Bailey v. State](#), 348 N.C. 130, 500 S.E.2d 54 (1998).
 U.S.—[Upchurch Packing Co., Inc. v. U.S.](#), 151 F.2d 983 (C.C.A. 5th Cir. 1945).
 N.Y.—[Ross v. State](#), 186 A.D. 156, 173 N.Y.S. 656 (3d Dep't 1919).
17 Mo.—[State v. Armentrout](#), 8 S.W.3d 99 (Mo. 1999).
 N.C.—[State v. White](#), 340 N.C. 264, 457 S.E.2d 841 (1995).
18 Va.—[City of Alexandria v. Texas Co.](#), 172 Va. 209, 1 S.E.2d 296 (1939).
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16 C.J.S. Constitutional Law § 193

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

5. Estoppel and Waiver

b. Estoppel to Challenge Constitutionality of Law

§ 193. Estoppel to challenge constitutionality of law, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  946, 950, 951

A person who has voluntarily claimed or accepted the benefit of a statute may be estopped to assert its unconstitutionality.

The doctrine of estoppel as applied to the right to question the constitutionality of a statute is not applied solely on technicalities but must also rest on substantial grounds of prejudice or change of position.¹ A person who has submitted voluntarily to the operation of a statute or ordinance may not question its constitutionality² unless the compliance is under compulsion.³

One who has acted under the statute, and in pursuance of the authority conferred by it, to the detriment of others, is similarly estopped.⁴ Although there is some authority to the contrary,⁵ one who has voluntarily claimed or accepted the benefit of a statute is estopped to assert its unconstitutionality,⁶ at least if the claiming or acceptance of benefits is to the detriment of others⁷ and if he or she has acted affirmatively to procure the benefit.⁸ One who voluntarily proceeds under a statute, rule, or action of a state commission, and claims benefits thereby conferred, will not be heard to question the constitutionality of the statute, rule, or action in order to avoid its burdens.⁹

A government entity which comes into being through the enactment of a statute cannot attack the provisions of the statute,¹⁰ and a municipality may not attack the law of the state that created it.¹¹ Similarly, an association is not entitled to attack the constitutionality of the law under which it was organized.¹² This is so even if the statute is subsequently declared unconstitutional.¹³

The doctrine of estoppel has been held inapplicable to one who has not been guilty of fraud, or whose conduct has not misled another as to the validity of a statute, simply because he or she has treated as legal and valid an act void and open to the inspection of all.¹⁴ Thus, it has been held in some instances that one will not be estopped by his or her acts or omissions to question the constitutionality of a statute if his or her adversary is not prejudiced by the acts or omissions¹⁵ or where any injury to the adversary is a result of his or her own instigation.¹⁶

The general rule that a party deriving benefits from a statute is estopped from questioning its validity does not apply where specific statutory authorization exists for challenging the invalid provision.¹⁷

The fact that one would be estopped to challenge the constitutionality of a particular provision of a statute is no bar to such a challenge as to an independent and separable provision of the same act¹⁸ or an amendment of the statute.¹⁹ The fact that one complied with and favored the enforcement of a statute before the passage of an amendment to the statute which materially changed it does not estop him or her to assert the unconstitutionality of the statute as amended.²⁰

Foreign corporations.

The right of a state to withhold from a foreign corporation permission to do local business in the state does not enable it to require the corporation to surrender the protection of the constitution so that a foreign corporation, by obtaining permission to do business in a state, does not become obligated to comply with, or estopped to object to, any provision in the state statutes in conflict with the constitution.²¹ Likewise, a foreign corporation is not deemed to have consented, as a condition on which it was granted permission to do business in a state, to comply with statutes enacted subsequent to the grant of permission and is, therefore, not estopped to question the constitutionality of such statutes.²² Thus, a foreign corporation already doing business within the state under a permit may challenge the constitutionality of an act affecting its right to continue to do business.²³

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Footnotes

- 1 Neb.—*State ex rel. Johnson v. Consumers Public Power Dist.*, 143 Neb. 753, 10 N.W.2d 784, 152 A.L.R. 480 (1943).
- 2 U.S.—*U.S. v. Yeagle*, 299 F. Supp. 257 (E.D. Ky. 1969).
Fla.—*Bon Ton Cleaners & Dyers v. Cleaning, Dyeing & Pressing Bd.*, 128 Fla. 533, 176 So. 55 (1937).
Iowa—*Loftus v. Department of Agr. of Iowa*, 211 Iowa 566, 232 N.W. 412 (1930).
Tex.—*Thomas v. Groebel*, 147 Tex. 70, 212 S.W.2d 625 (1948).
- 3 Fla.—*Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 245 So. 2d 625 (Fla. 1971).
Me.—*Begin v. Inhabitants of Town of Sabattus*, 409 A.2d 1269 (Me. 1979).
Mont.—*Union Bank & Trust Co. of Helena v. Moore*, 62 Mont. 132, 204 P. 361 (1922).
- 4 U.S.—*Errett v. Rasmussen*, 414 F. Supp. 402 (S.D. Iowa 1976).
N.Y.—*Cushman v. McGoldrick*, 126 N.Y.S.2d 841 (Sup 1953).
- 5 Minn.—*Wegan v. Village of Lexington*, 309 N.W.2d 273 (Minn. 1981).
- 6 U.S.—*Alliant Energy Corp. v. Bie*, 330 F.3d 904 (7th Cir. 2003).

- Fla.—[Steigerwalt v. City of St. Petersburg](#), 316 So. 2d 554 (Fla. 1975).
- Neb.—[American Motors Sales Corp. v. Perkins](#), 198 Neb. 97, 251 N.W.2d 727 (1977).
- N.M.—[Witt v. Hartman](#), 1970-NMSC-147, 82 N.M. 170, 477 P.2d 608 (1970).
- N.C.—[Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment](#), 354 N.C. 298, 554 S.E.2d 634 (2001).
- N.D.—[Frieh v. City of Edgeley](#), 317 N.W.2d 818 (N.D. 1982).
- S.C.—[Boyd v. State Farm Mut. Auto. Ins. Co.](#), 260 S.C. 316, 195 S.E.2d 706 (1973).
- Tex.—[Fort Worth Independent School Dist. v. City of Fort Worth](#), 22 S.W.3d 831 (Tex. 2000).
- Va.—[Bisping v. Com.](#), 218 Va. 753, 240 S.E.2d 656 (1978).
- Wyo.—[Budd v. Bishop](#), 543 P.2d 368 (Wyo. 1975).
- 7 Mont.—[McMahon v. Cooney](#), 95 Mont. 138, 25 P.2d 131 (1933).
- 8 U.S.—[Spaulding v. Douglas Aircraft Co.](#), 154 F.2d 419 (C.C.A. 9th Cir. 1946).
- Ariz.—[Burri v. Campbell](#), 102 Ariz. 541, 434 P.2d 627 (1967).
- Neb.—[Simpson v. City of North Platte](#), 206 Neb. 240, 292 N.W.2d 297 (1980).
- 9 N.C.—[Philip Morris USA Inc. v. Tolson](#), 176 N.C. App. 509, 626 S.E.2d 853 (2006).
- 10 Colo.—[Central Colorado Water Conservancy Dist. v. Colorado River Water Conservation Dist.](#), 186 Colo. 193, 526 P.2d 302 (1974).
- 11 U.S.—[City of Boston v. Massachusetts Port Authority](#), 444 F.2d 167 (1st Cir. 1971).
- 12 Ga.—[Johnson v. Georgia-Carolina Retail Milk Producers Ass'n](#), 182 Ga. 695, 186 S.E. 824 (1936).
- Miss.—[Mississippi Ins. Guaranty Ass'n v. Gandy](#), 289 So. 2d 677 (Miss. 1973).
- 13 Ohio—[Bituminous Coal Producers Bd. for Dist. No. 4 v. Starr-Jackson Min. Co.](#), 135 Ohio St. 429, 14 Ohio Op. 322, 21 N.E.2d 345 (1939).
- 14 U.S.—[O'Brien v. Wheelock](#), 184 U.S. 450, 22 S. Ct. 354, 46 L. Ed. 636 (1902).
- Miss.—[Moore v. Tunica County](#), 143 Miss. 821, 107 So. 659 (1926).
- Tenn.—[Obion County v. Coulter](#), 153 Tenn. 469, 284 S.W. 372 (1924).
- 15 Cal.—[Van Camp Sea Food Co. v. Newbert](#), 76 Cal. App. 445, 244 P. 946 (2d Dist. 1926).
- Md.—[Commissioners of Prince George's County v. Northwest Cemetery Co.](#), 160 Md. 653, 154 A. 452 (1931).
- N.H.—[Eyers Woolen Co. v. Town of Gilsum](#), 84 N.H. 1, 146 A. 511, 64 A.L.R. 1196 (1929).
- 16 Cal.—[Van Camp Sea Food Co. v. Newbert](#), 76 Cal. App. 445, 244 P. 946 (2d Dist. 1926).
- 17 U.S.—[Oklahoma v. U.S. Civil Service Com'n](#), 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947).
- 18 U.S.—[Thompson v. Consolidated Gas Utilities Corp.](#), 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510 (1937).
- Ark.—[Terry v. Thornton](#), 207 Ark. 1019, 183 S.W.2d 787 (1944).
- Fla.—[Lollie v. General Am. Tank Storage Terminals](#), 160 Fla. 208, 34 So. 2d 306 (1948).
- Mo.—[Kristanik v. Chevrolet Motor Co.](#), 335 Mo. 60, 70 S.W.2d 890 (1934).
- Neb.—[May v. City of Kearney](#), 145 Neb. 475, 17 N.W.2d 448 (1945).
- 19 Ga.—[City of Atlanta v. Anglin](#), 209 Ga. 170, 71 S.E.2d 419 (1952).
- Tenn.—[Kivett v. Mason](#), 185 Tenn. 558, 206 S.W.2d 789 (1947).
- 20 U.S.—[Motor Transit Co. v. Railroad Commission of Cal.](#), 15 F. Supp. 630 (S.D. Cal. 1936).
- 21 U.S.—[Quaker City Cab Co. v. Commonwealth of Pennsylvania](#), 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928) (abrogated on other grounds by, [Lehnhausen v. Lake Shore Auto Parts Co.](#), 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)).
- Ariz.—[Employers' Liability Assur. Corp. v. Frost](#), 48 Ariz. 402, 62 P.2d 320, 107 A.L.R. 1413 (1936).
- Fla.—[State v. Tedder](#), 103 Fla. 1083, 138 So. 643 (1932).
- S.C.—[Jones v. Prudential Ins. Co.](#), 210 S.C. 264, 42 S.E.2d 331 (1947).
- U.S.—[Connecticut General Life Ins. Co. v. Johnson](#), 303 U.S. 77, 58 S. Ct. 436, 82 L. Ed. 673 (1938).
- 22 U.S.—[Herndon v. Chicago, R.I. & P. Ry. Co.](#), 218 U.S. 135, 30 S. Ct. 633, 54 L. Ed. 970 (1910); [Ludwig v. Western Union Telegraph Co.](#), 216 U.S. 146, 30 S. Ct. 280, 54 L. Ed. 423 (1910).
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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

5. Estoppel and Waiver

b. Estoppel to Challenge Constitutionality of Law

§ 194. Acquiescence and laches

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 946, 951, 953

While acquiescence in a statute may estop one from challenging its constitutionality, this is not the rule where a statute is clearly unconstitutional.

To raise a constitutional challenge properly, the challenge must be raised at the first available opportunity¹ and preserved at each step of the judicial process.² A constitutional claim can become time-barred just as any other claim can.³ A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.⁴ Acquiescence in a statute⁵ or the failure to raise a timely objection to the statute after an opportunity to do so has presented itself⁶ may estop a person to challenge the constitutionality of the statute. However, where a statute is clearly unconstitutional, it cannot be made valid by the laches or acquiescence of anyone,⁷ or any lapse of time,⁸ and time will not inure to the benefit of those who flout the constitution.⁹

While the courts are reluctant to disturb a statute after a long period of time,¹⁰ the authorities cannot place on affected persons the burden of objecting to a statute or rule at the time of its formulation or adoption under pain of thereafter being estopped to attack its validity.¹¹ Acquiescence in a statute will not create an estoppel as to the future operation of the statute.¹²

Representatives of minors or incompetent persons.

A guardian's lack of diligence may operate to bar a legally incompetent person's open courts challenge.¹³ A next friend's lack of due diligence may operate to bar a minor child's open courts challenge.¹⁴

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Footnotes

- 1 Mo.—[Mayes v. Saint Luke's Hosp. of Kansas City](#), 430 S.W.3d 260 (Mo. 2014).
Mont.—[State v. Roundstone](#), 2011 MT 227, 362 Mont. 74, 261 P.3d 1009 (2011).
- As-applied and facial challenges**
Parties advancing an as-applied challenge to a statute, ordinance, or administrative rule must raise that challenge at the first available opportunity, and failure to do so results in waiver of the issue on appeal; but they need not do so if arguing a facial challenge.
Ohio—[Wymyslo v. Bartec, Inc.](#), 132 Ohio St. 3d 167, 2012-Ohio-2187, 970 N.E.2d 898 (2012).
- Due process challenge**
A school employee waived, for purposes of appeal, his claim that the county board of education and the director of schools violated his due process rights by dismissing him prior to providing him a full hearing; the employee could have raised the issue of the timeliness of the full hearing either before it was conducted or during it, and the employee's failure to raise the issue precluded the hearing officer from ordering any correction, and the employee also failed to prosecute his appeal to the board to a conclusion on the merits, thereby depriving the board of the same opportunity.
Tenn.—[Bailey v. Blount County Bd. of Educ.](#), 303 S.W.3d 216, 254 Ed. Law Rep. 420 (Tenn. 2010).
2 Mo.—[Strong v. State](#), 263 S.W.3d 636 (Mo. 2008).
3 U.S.—[U.S. v. Clintwood Elkhorn Min. Co.](#), 553 U.S. 1, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008).
Neb.—[Lindner v. Kindig](#), 285 Neb. 386, 826 N.W.2d 868 (2013).
Utah—[Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne](#), 2012 UT 66, 289 P.3d 502 (Utah 2012).
- 4 Cal.—[People v. Trujillo](#), 60 Cal. 4th 850, 182 Cal. Rptr. 3d 143, 340 P.3d 371 (2015).
Ky.—[Bowling v. Com.](#), 163 S.W.3d 361 (Ky. 2005), as modified, (Apr. 22, 2005).
Minn.—[State v. Beaulieu](#), 859 N.W.2d 275 (Minn. 2015).
Neb.—[State v. Keen](#), 272 Neb. 123, 718 N.W.2d 494 (2006).
- 5 Conn.—[McMahon v. Weber](#), 29 Conn. Supp. 195, 278 A.2d 468 (Super. Ct. 1971).
N.D.—[Baird v. Chamberland](#), 70 N.D. 109, 292 N.W. 219 (1940).
Pa.—[Montgomery County Bar Ass'n v. Rinalducci](#), 329 Pa. 296, 197 A. 924 (1938).
Vt.—[Brattleboro Retreat v. Town of Brattleboro](#), 106 Vt. 228, 173 A. 209 (1934).
- Long-term compliance**
A telephone company waived its complaint that an arrangement wherein it agreed to pay a city a percentage of its gross receipts in lieu of charges, fees, and taxes owed for its location of poles, wires, and other facilities on city property violated constitutional requirements that taxation be equal and uniform and that property be taxed in proportion to its value by complying with the arrangement for more than half a century.
Tex.—[Fort Worth Independent School Dist. v. City of Fort Worth](#), 22 S.W.3d 831 (Tex. 2000).
- 6 U.S.—[Trager v. Peabody Redevelopment Authority](#), 367 F. Supp. 1000 (D. Mass. 1973).
Fla.—[Baker v. State Road Dept. of Fla.](#), 79 So. 2d 511 (Fla. 1955).
Md.—[Medley v. State](#), 52 Md. App. 225, 448 A.2d 363 (1982).
Pa.—[In re Marshall](#), 363 Pa. 326, 69 A.2d 619 (1949).
- Challenge not barred by laches**

(1) An action challenging a ballot measure as violative of the single-subject rule of a state constitution was not barred by laches; the filing of the complaint almost eight weeks prior to the deadline for mailing a publicity pamphlet for early voting allowed sufficient time to render a decision before absentee balloting began.

Ariz.—[Korte v. Bayless](#), 199 Ariz. 173, 16 P.3d 200 (2001).

(2) Laches did not bar an original proceeding before the state supreme court by 46 state residents and registered voters who challenged the procedural validity of a constitutional amendment which had been approved by voters in the general election where the plaintiffs had sought judicial relief in the circuit court to correct perceived irregularities in the election process, prior to the election, 10 days after they were put on constructive notice of the perceived irregularities.

Haw.—[Watland v. Lingle](#), 104 Haw. 128, 85 P.3d 1079 (2004), as clarified, (Mar. 19, 2004).

7

La.—[Graham v. Jones](#), 198 La. 507, 3 So. 2d 761 (1941).

Mass.—[Sears v. Treasurer and Receiver General](#), 327 Mass. 310, 98 N.E.2d 621 (1951).

Tex.—[State v. McDonald](#), 220 S.W.2d 732 (Tex. Civ. App. Texarkana 1949), writ refused.

8

U.S.—[Arbuckle Broadcasters, Inc. v. Rockwell Intern. Corp.](#), 513 F. Supp. 407 (N.D. Tex. 1980).

Ill.—[Harmon v. City of Peoria](#), 373 Ill. 594, 27 N.E.2d 525 (1940).

Mass.—[Sears v. Treasurer and Receiver General](#), 327 Mass. 310, 98 N.E.2d 621 (1951).

N.Y.—[Vernon Park Realty v. City of Mount Vernon](#), 122 N.Y.S.2d 78 (Sup 1953), judgment aff'd, [282 A.D. 890, 125 N.Y.S.2d 112](#) (2d Dep't 1953), judgment aff'd, [307 N.Y. 493, 121 N.E.2d 517](#) (1954).

Or.—[State v. Grieco](#), 184 Or. 253, 195 P.2d 183 (1948).

9

N.J.—[Gimbel v. Peabody](#), 114 N.J.L. 574, 178 A. 62 (N.J. Sup. Ct. 1935).

10

Or.—[State v. Grieco](#), 184 Or. 253, 195 P.2d 183 (1948).

11

Cal.—[Del Mar Canning Co. v. Payne](#), 29 Cal. 2d 380, 175 P.2d 231 (1946).

12

U.S.—[Alston v. School Bd. of City of Norfolk](#), 112 F.2d 992, 130 A.L.R. 1506 (C.C.A. 4th Cir. 1940).

Pa.—[Wilson v. School Dist. of Philadelphia](#), 328 Pa. 225, 195 A. 90, 113 A.L.R. 1401 (1937).

School transportation charge

The fact that a student who brought an action challenging a statute authorizing a school district to charge for transportation to school had agreed to pay the charge and obtain transportation did not preclude her from challenging the constitutionality of the statute.

U.S.—[Kadrmas v. Dickinson Public Schools](#), 487 U.S. 450, 108 S. Ct. 2481, 101 L. Ed. 2d 399, 47 Ed. Law Rep. 383 (1988).

13

Tex.—[Tenet Hospitals Ltd. v. Rivera](#), 445 S.W.3d 698 (Tex. 2014).

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Tex.—[Tenet Hospitals Ltd. v. Rivera](#), 445 S.W.3d 698 (Tex. 2014).

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Constitutional Law

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c. Waiver

§ 195. Requisites of valid waiver of constitutional right

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  947, 948, 950

In order for a waiver of a constitutional right to be valid, it must be made voluntarily, intelligently, and knowingly and with sufficient awareness of the relevant circumstances and likely consequences.

A waiver of a fundamental constitutional right must be made knowingly, intelligently, and voluntarily¹ and with sufficient awareness of the relevant circumstances and likely consequences.² A valid waiver connotes an intentional relinquishment or abandonment of a known right or privilege.³ Thus, the waiver of constitutional rights is accompanied by procedural safeguards to ensure that defendants are properly advised of their rights.⁴

The "knowing and intelligent" standard does not apply to all waivers of constitutional rights but only to waivers of fundamental constitutional rights.⁵ Fundamental rights, in this context, are basic rights of constitutional origin, whether federal or state, that have been guaranteed to a criminal defendant in order to preserve a fair trial and the reliability of the truth-determining process,⁶ such as the right to testify.⁷ A procedural waiver of the right to assert a constitutional claim, as opposed to a defendant's express or

implied consent for a loss of a substantive constitutional right, need not be knowing and intelligent.⁸ Generally, a constitutional privilege may be waived when knowingly done as part of trial strategy.⁹ However, trial strategy adopted by counsel without prior consultation with the defendant will not preclude the defendant from asserting his or her constitutional rights under exceptional circumstances.¹⁰ Even though the waiver of a constitutional right may be informed by strategic considerations, it cannot be involuntary.¹¹

The waiver of a constitutional right is voluntary and intelligent if the record expressly reflects that the defendant had a basic understanding of the nature of the right which was relinquished or abandoned and expressly reflects acknowledgment that the defendant made or agreed to the relinquishment or abandonment of that right.¹² However, it is not required that the defendant be advised by an attorney before a waiver can be voluntary and knowing.¹³ To be voluntary, a waiver of a constitutional right must not be the result of intimidation, coercion, or deception.¹⁴ A waiver of a constitutional right is "voluntary" if it is not coerced either physically or psychologically.¹⁵ A defendant's waiver of a constitutional right is made "knowingly" if the defendant knows of the existence of the right and any other information legally relevant to the making of an informed decision either to exercise or relinquish that right.¹⁶ A defendant's waiver of a constitutional right is "intelligent" if the defendant is fully aware of what he or she is doing and makes a conscious, informed choice to relinquish the known right.¹⁷

The question of an effective waiver of a federal constitutional right is a federal one governed by federal standards.¹⁸ Whether a constitutional right, privilege, or immunity has been validly waived depends on the totality of the circumstances¹⁹ and the facts of each case,²⁰ including the background, experience, and conduct of the person allegedly making the waiver.²¹

The responsibility for ensuring that defendants' waivers of their constitutional rights satisfy the supreme court's requirements belongs to the trial judge.²²

CUMULATIVE SUPPLEMENT

Cases:

Physician did not knowingly and clearly waive his due process right to a hearing prior to the termination of his hospital privileges by agreeing to be bound by hospital policy that provided for "automatic termination" without a pre-termination hearing; policy was akin to contract of adhesion, as physician had not entered into a reciprocal negotiation for hospital privileges, and neither the policy nor the document physician signed for his reinstatement at hospital specifically mentioned waiving due process. [U.S. Const. Amend. 14. Brandner v. Providence Health & Services, 384 P.3d 773 \(Alaska 2016\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Brady v. U.S., 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 \(1970\)](#).
Ariz.—[State v. Bocharski, 200 Ariz. 50, 22 P.3d 43 \(2001\)](#).
Fla.—[Chames v. DeMayo, 972 So. 2d 850 \(Fla. 2007\)](#).
Haw.—[State v. Quino, 74 Haw. 161, 840 P.2d 358 \(1992\)](#).
Idaho—[Murray v. State, 156 Idaho 159, 321 P.3d 709 \(2014\)](#).
Iowa—[State v. Countryman, 572 N.W.2d 553 \(Iowa 1997\)](#).
Kan.—[State v. Shaw, 259 Kan. 3, 910 P.2d 809 \(1996\)](#).

Ky.—[Crawley v. Com.](#), 107 S.W.3d 197 (Ky. 2003).
Me.—[State v. Hill](#), 2014 ME 16, 86 A.3d 628 (Me. 2014).
Mich.—[People v. Stevens](#), 461 Mich. 655, 610 N.W.2d 881 (2000).
Mo.—[State v. Bucklew](#), 973 S.W.2d 83 (Mo. 1998).
Mont.—[State v. Reim](#), 2014 MT 108, 374 Mont. 487, 323 P.3d 880 (2014).
Neb.—[State v. Clear](#), 236 Neb. 648, 463 N.W.2d 581 (1990).
N.D.—[Binder v. Binder](#), 557 N.W.2d 738 (N.D. 1996).
Okla.—[Bryson v. State](#), 1994 OK CR 32, 876 P.2d 240 (Okla. Crim. App. 1994).
S.C.—[Sims v. State](#), 313 S.C. 420, 438 S.E.2d 253 (1993).
S.D.—[City of Pierre v. Blackwell](#), 2001 SD 127, 635 N.W.2d 581 (S.D. 2001).
Tenn.—[State v. Blackmon](#), 984 S.W.2d 589 (Tenn. 1998).
Tex.—[In re Prudential Ins. Co. of America](#), 148 S.W.3d 124 (Tex. 2004).
Utah—[Jenkins v. Percival](#), 962 P.2d 796 (Utah 1998).
Wash.—[State v. Humphries](#), 181 Wash. 2d 708, 336 P.3d 1121 (2014).
W. Va.—[State ex rel. Gill v. Irons](#), 207 W. Va. 199, 530 S.E.2d 460 (2000).

Specifically, voluntarily, and knowingly

Mont.—[State v. McCarthy](#), 2004 MT 312, 324 Mont. 1, 101 P.3d 288 (2004).

Due process notice of trial

Tex.—[In re K.M.L.](#), 443 S.W.3d 101 (Tex. 2014).

Right to counsel

Generally speaking, to the extent that the constitution affords a right to counsel at government expense that arises from the guarantee of due process, it affords a right that is not waived merely by a party unknowingly failing to insist upon a lawyer in a proceeding in which the party is not even advised that he or she might request counsel.

Ga.—[Miller v. Deal](#), 295 Ga. 504, 761 S.E.2d 274 (2014).

2

U.S.—[Brady v. U.S.](#), 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

Kan.—[State v. Shaw](#), 259 Kan. 3, 910 P.2d 809 (1996).

Neb.—[State v. Paul](#), 256 Neb. 669, 592 N.W.2d 148 (1999).

N.D.—[State v. Olson](#), 544 N.W.2d 144 (N.D. 1996).

S.D.—[Witchey v. Leapley](#), 483 N.W.2d 202 (S.D. 1992).

Tenn.—[State v. Blackmon](#), 984 S.W.2d 589 (Tenn. 1998).

Tex.—[In re Prudential Ins. Co. of America](#), 148 S.W.3d 124 (Tex. 2004).

Nature of right and risk of forfeit

For an individual to be able to make a knowing and intelligent waiver of a constitutional right, he or she must have been aware of both the nature of the constitutional right and the risk of forfeiting it.

Pa.—[Com. v. Vega](#), 553 Pa. 255, 719 A.2d 227 (1998).

3

Miss.—[Chunn v. State](#), 669 So. 2d 29 (Miss. 1996).

Tenn.—[State v. Blackmon](#), 984 S.W.2d 589 (Tenn. 1998).

Utah—[Barnard v. Wassermann](#), 855 P.2d 243 (Utah 1993).

W. Va.—[Losh v. McKenzie](#), 166 W. Va. 762, 277 S.E.2d 606 (1981).

4

Colo.—[People v. Walker](#), 2014 CO 6, 318 P.3d 479 (Colo. 2014), cert. denied, 135 S. Ct. 112, 190 L. Ed. 2d 88 (2014).

5

Md.—[State v. Torres](#), 86 Md. App. 560, 587 A.2d 582 (1991).

6

Md.—[State v. Gutierrez](#), 153 Md. App. 462, 837 A.2d 238 (2003).

7

Ky.—[Crawley v. Com.](#), 107 S.W.3d 197 (Ky. 2003).

8

Mass.—[Com. v. Deeran](#), 397 Mass. 136, 490 N.E.2d 412 (1986).

9

U.S.—[U.S. v. Gomez](#), 457 F.2d 593 (4th Cir. 1972); [Zerschausky v. Beto](#), 396 F.2d 356 (5th Cir. 1968).

10

U.S.—[Henry v. State of Miss.](#), 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965).

Alaska—[Lanier v. State](#), 486 P.2d 981 (Alaska 1971).

11

Wash.—[State v. Humphries](#), 181 Wash. 2d 708, 336 P.3d 1121 (2014).

12

Md.—[Biglari v. State](#), 156 Md. App. 657, 847 A.2d 1239 (2004).

13

Ill.—[People v. Marin](#), 48 Ill. 2d 205, 269 N.E.2d 303 (1971).

14

Iowa—[State v. Countryman](#), 572 N.W.2d 553 (Iowa 1997).

Or.—[Huffman v. Alexander](#), 197 Or. 283, 251 P.2d 87 (1952).

Pa.—[Com. v. Jones](#), 457 Pa. 423, 322 A.2d 119 (1974).

15 Colo.—[People v. Walker](#), 2014 CO 6, 318 P.3d 479 (Colo. 2014), cert. denied, 135 S. Ct. 112, 190 L. Ed. 2d 88 (2014).

Stipulation

The signature by the defendant on defense counsel's stipulation that the defendant had a prior conviction for a serious offense, as an element of the charged offense of first-degree unlawful possession of a firearm, did not constitute an informed and voluntary waiver of the defendant's due process right to require that the State meet its burden of proof as to every element of the crime; the trial court and defense counsel erroneously told the defendant, who had objected to the stipulation, that his consent was not required; the defendant did not sign the stipulation until after it was read to the jury and the defense presented its case; and nothing suggested that the signature was anything other than forced acquiescence to what had already occurred.

Wash.—[State v. Humphries](#), 181 Wash. 2d 708, 336 P.3d 1121 (2014).

16 Colo.—[People v. Walker](#), 2014 CO 6, 318 P.3d 479 (Colo. 2014), cert. denied, 135 S. Ct. 112, 190 L. Ed. 2d 88 (2014).

17 Colo.—[People v. Walker](#), 2014 CO 6, 318 P.3d 479 (Colo. 2014), cert. denied, 135 S. Ct. 112, 190 L. Ed. 2d 88 (2014).

18 U.S.—[Boykin v. Alabama](#), 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Alaska—[Lanier v. State](#), 486 P.2d 981 (Alaska 1971).

N.Y.—[People v. Michael](#), 48 N.Y.2d 1, 420 N.Y.S.2d 371, 394 N.E.2d 1134 (1979).

R.I.—[Bishop v. Langlois](#), 106 R.I. 56, 256 A.2d 20 (1969).

19 U.S.—[Petersen v. Florida Bar](#), 720 F. Supp. 2d 1351 (M.D. Fla. 2010) (applying Florida law).

Haw.—[State v. Pau'u](#), 72 Haw. 505, 824 P.2d 833 (1992).

Mo.—[State v. Bucklew](#), 973 S.W.2d 83 (Mo. 1998).

Utah—[Barnard v. Wassermann](#), 855 P.2d 243 (Utah 1993).

20 U.S.—[U.S. v. Shea](#), 508 F.2d 82 (5th Cir. 1975); [Correa v. Nampa School Dist. No. 131](#), 645 F.2d 814 (9th Cir. 1981).

Ala.—[Miller v. State](#), 337 So. 2d 1360 (Ala. Crim. App. 1976).

Ga.—[Martin v. State](#), 160 Ga. App. 275, 287 S.E.2d 244 (1981).

Iowa—[State v. Jacoby](#), 260 N.W.2d 828 (Iowa 1977).

Mich.—[People v. McKinley](#), 383 Mich. 529, 176 N.W.2d 406 (1970).

Mo.—[State v. Bucklew](#), 973 S.W.2d 83 (Mo. 1998).

Minn.—[State v. Little](#), 851 N.W.2d 878 (Minn. 2014).

N.M.—[State ex rel. Dept. of Human Services v. Perlman](#), 96 N.M. 779, 1981-NMCA-076, 635 P.2d 588 (Ct. App. 1981).

S.D.—[State v. Adkins](#), 88 S.D. 571, 225 N.W.2d 598 (1975).

Tenn.—[State v. Manus](#), 632 S.W.2d 137 (Tenn. Ct. App. 1982).

Tex.—[Industrial Foundation of the South v. Texas Indus. Acc. Bd.](#), 540 S.W.2d 668 (Tex. 1976).

Wyo.—[Belden v. State](#), 2003 WY 89, 73 P.3d 1041 (Wyo. 2003).

21 Conn.—[State v. Ouellette](#), 271 Conn. 740, 859 A.2d 907 (2004).

Del.—[Davis v. State](#), 809 A.2d 565 (Del. 2002).

Minn.—[State v. Little](#), 851 N.W.2d 878 (Minn. 2014).

Mo.—[State v. Bucklew](#), 973 S.W.2d 83 (Mo. 1998).

22 U.S.—[McComey v. Epps](#), 658 F.3d 491 (5th Cir. 2011).

16 C.J.S. Constitutional Law § 196

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

C. Persons Entitled to Raise Constitutional Questions

5. Estoppel and Waiver

c. Waiver

§ 196. Proof of waiver of constitutional right

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  947

A high degree of proof is required for the establishment of a waiver of constitutional rights, and there is a presumption against the waiver of such rights.

Courts do not presume acquiescence in the loss of fundamental constitutional rights.¹ Rather, high standards of proof are required to establish a waiver of constitutional rights.² A waiver of a constitutional right must be clear³ and must appear on the record.⁴ When freedom of speech is at issue, a court will find a waiver only in circumstances that are clear and compelling.⁵

Although there is authority to the contrary,⁶ an express waiver is not generally required.⁷ However, implied waivers are not favored,⁸ and a waiver of constitutional rights is not to be presumed from a silent record.⁹ Courts indulge every reasonable presumption against a waiver of a fundamental constitutional right,¹⁰ and the party who asserts the waiver of a fundamental right

has a heavy¹¹ burden of proving waiver.¹² However, where it appears from the record that the defendant in a criminal case has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence.¹³

The doctrine of constructive consent is not commonly associated with the surrender of constitutional rights.¹⁴

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Footnotes

- 1 Colo.—[Moore v. People](#), 2014 CO 8, 318 P.3d 511 (Colo. 2014).
Conn.—[State v. Woods](#), 297 Conn. 569, 4 A.3d 236 (2010).
Iowa—[State v. Neiderbach](#), 837 N.W.2d 180 (Iowa 2013), as amended on denial of reh'g, (Oct. 8, 2013) and as corrected, (Nov. 22, 2013).
- 2 U.S.—[U. S. ex rel. Ross v. Franzen](#), 668 F.2d 933 (7th Cir. 1982), on reh'g, [688 F.2d 1181](#) (7th Cir. 1982).
Ariz.—[State v. Evans](#), 125 Ariz. 401, 610 P.2d 35 (1980).
D.C.—[U.S. v. Powe](#), 591 F.2d 833 (D.C. Cir. 1978).
Pa.—[Com. v. Collins](#), 436 Pa. 114, 259 A.2d 160 (1969).
- In-custody interrogation**
The high standards of proof for the waiver of constitutional rights apply to in-custody interrogation.
- 3 U.S.—[Miranda v. Arizona](#), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).
U.S.—[Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
Cal.—[People v. Gray](#), 135 Cal. App. 3d 859, 185 Cal. Rptr. 772 (2d Dist. 1982).
Ill.—[People v. Campbell](#), 208 Ill. 2d 203, 280 Ill. Dec. 684, 802 N.E.2d 1205 (2003).
La.—[State v. McKinney](#), 406 So. 2d 160 (La. 1981).
Me.—[Verizon New England, Inc. v. Public Utilities Com'n](#), 2005 ME 16, 866 A.2d 844 (Me. 2005).
Mass.—[Com. v. Dustin](#), 373 Mass. 612, 368 N.E.2d 1388 (1977).
Mich.—[People v. Wright](#), 441 Mich. 140, 490 N.W.2d 351 (1992).
N.J.—[Matter of Guardianship of C. M.](#), 158 N.J. Super. 585, 386 A.2d 913 (Juv. & Dom. Rel. Ct. 1978).
Wash.—[Rogoski v. Hammond](#), 9 Wash. App. 500, 513 P.2d 285 (Div. 1 1973).
- 4 Cal.—[In re Anthony J.](#), 86 Cal. App. 3d 164, 150 Cal. Rptr. 183 (1st Dist. 1978).
D.C.—[Boyd v. U.S.](#), 586 A.2d 670, 90 A.L.R.4th 561 (D.C. 1991).
Fla.—[Saunders v. Wainwright](#), 254 So. 2d 197 (Fla. 1971).
Idaho—[State v. Weber](#), 140 Idaho 89, 90 P.3d 314 (2004).
Md.—[Biglari v. State](#), 156 Md. App. 657, 847 A.2d 1239 (2004).
Neb.—[State v. Clear](#), 236 Neb. 648, 463 N.W.2d 581 (1990).
Tenn.—[State v. Blackmon](#), 984 S.W.2d 589 (Tenn. 1998).
- 5 U.S.—[Curtis Pub. Co. v. Butts](#), 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967); [National Polymer Products, Inc. v. Borg-Warner Corp.](#), 641 F.2d 418, 31 Fed. R. Serv. 2d 129 (6th Cir. 1981); [In re Halkin](#), 598 F.2d 176, 26 Fed. R. Serv. 2d 798 (D.C. Cir. 1979).
Tex.—[Osterberg v. Peca](#), 12 S.W.3d 31 (Tex. 2000).
- 6 Cal.—[People v. Collins](#), 26 Cal. 4th 297, 109 Cal. Rptr. 2d 836, 27 P.3d 726 (2001) (waiver of fundamental right must be made expressly).
N.D.—[State v. Wilson](#), 488 N.W.2d 618 (N.D. 1992) (waivers of constitutional rights must not be inferred but must be clearly and intentionally made).
- 7 U.S.—[U.S. v. Morris](#), 491 F. Supp. 226 (S.D. Ga. 1980).
Conn.—[State v. Durkin](#), 219 Conn. 629, 595 A.2d 826 (1991).
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Minn.—[State v. Blom](#), 682 N.W.2d 578 (Minn. 2004).
N.H.—[State v. Plante](#), 133 N.H. 384, 577 A.2d 95 (1990).
- 8 Conn.—[McClain v. Manson](#), 183 Conn. 418, 439 A.2d 430 (1981).
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Wyo.—[Cathcart v. Meyer](#), 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).

- 9 U.S.—[U.S. v. Corbitt](#), 541 F.2d 146 (3d Cir. 1976); [Reeves v. Mabry](#), 615 F.2d 489 (8th Cir. 1980).
Ala.—[Adair v. State](#), 53 Ala. App. 251, 298 So. 2d 671 (Crim. App. 1974).
Conn.—[State v. Woods](#), 297 Conn. 569, 4 A.3d 236 (2010).
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Ind.—[Good v. State](#), 267 Ind. 29, 366 N.E.2d 1169 (1977).
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N.J.—[State in Interest of R. H.](#), 170 N.J. Super. 518, 406 A.2d 1350 (Juv. & Dom. Rel. Ct. 1979).
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Okla.—[Kendall v. State](#), 1971 OK CR 156, 483 P.2d 757 (Okla. Crim. App. 1971).
Pa.—[Com. v. Williams](#), 454 Pa. 368, 312 A.2d 597 (1973).
R.I.—[State v. Feng](#), 421 A.2d 1258 (R.I. 1980).
Tenn.—[State v. Blackmon](#), 984 S.W.2d 589 (Tenn. 1998).
- 10 U.S.—[College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.](#), 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605, 135 Ed. Law Rep. 362 (1999).
Ark.—[Walton v. State](#), 2012 Ark. 336, 423 S.W.3d 56 (2012).
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Ill.—[People v. Campbell](#), 208 Ill. 2d 203, 280 Ill. Dec. 684, 802 N.E.2d 1205 (2003).
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N.M.—[State v. Sanchez](#), 2000-NMSC-021, 129 N.M. 284, 6 P.3d 486 (2000).
N.J.—[Mazdabrook Commons Homeowners' Ass'n v. Khan](#), 210 N.J. 482, 46 A.3d 507 (2012).
Pa.—[Com. v. Monica](#), 528 Pa. 266, 597 A.2d 600 (1991).
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Mont.—[State v. Finley](#), 2003 MT 239, 317 Mont. 268, 77 P.3d 193 (2003).
Rebuttable presumption
Utah—[Barnard v. Wassermann](#), 855 P.2d 243 (Utah 1993).
11 U.S.—[Gonzalez v. Hidalgo County, Texas](#), 489 F.2d 1043 (5th Cir. 1973).
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Ind.—[Stewart v. State](#), 754 N.E.2d 492 (Ind. 2001).
Iowa—[State v. Watkins](#), 463 N.W.2d 411 (Iowa 1990).
N.M.—[State v. Salazar](#), 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996 (1997).
Pa.—[Com. v. Vega](#), 553 Pa. 255, 719 A.2d 227 (1998).
Tex.—[Muniz v. State](#), 851 S.W.2d 238 (Tex. Crim. App. 1993).
By preponderance of evidence
Pa.—[Com. v. Vega](#), 553 Pa. 255, 719 A.2d 227 (1998).

Beyond reasonable doubt

N.H.—[State v. Chrisicos, 148 N.H. 546, 813 A.2d 513 \(2002\)](#).

13 Haw.—[Domingo v. State, 76 Haw. 237, 873 P.2d 775 \(1994\)](#).

14 U.S.—[Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 \(1974\)](#).

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16 C.J.S. Constitutional Law § 197

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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C. Persons Entitled to Raise Constitutional Questions

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c. Waiver

§ 197. Competence to waive constitutional rights

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  947, 950

A defendant must be competent in order to waive his or her constitutional rights.

A defendant must be competent to waive his or her constitutional rights.¹ Although a mentally incompetent defendant cannot knowingly or intelligently waive constitutional rights,² evidence of a defendant's limited intellectual capacity, by itself, does not indicate that the defendant is incapable of waiving his or her constitutional rights.³ The fact that one suffers from certain mental deficiencies does not necessarily prevent that person from understanding and waiving constitutional rights.⁴ No higher level of competency is required for a defendant to waive his or her constitutional rights than that generally required for a defendant to stand trial.⁵ Thus, an accused who is competent to stand trial also is competent to waive constitutional rights, including the right to a jury trial.⁶

While a guilty plea may only be attacked on the basis that it was not knowing and voluntary, it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently waive his or her rights.⁷

A person under the influence of alcohol is legally competent to waive constitutional rights if, despite the degree of intoxication, he or she is aware and able to comprehend and to communicate with coherence and rationality.⁸ Similarly, intake of drugs does not necessarily prevent a defendant from knowingly and intelligently waiving his or her constitutional rights.⁹ To make this determination, a court must consider all of the attending circumstances, including the type and quantity of the drug, the exact time or times the drug was consumed, and whether impairment of the defendant's faculties ensued.¹⁰

A lack of understanding or mere confusion concerning criminal proceedings does not amount to mental incompetence, in determining whether a defendant was sufficiently competent to validly waive a constitutional right to a trial by jury.¹¹

Determining whether a capital defendant is competent to waive the presentation of mitigation evidence is similar to determining whether a death-sentenced prisoner is competent to abandon efforts to appeal his or her death sentence, which requires a determination of whether the defendant has the capacity to appreciate his or her position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he or she is suffering from a mental disease, disorder, or defect which may substantially affect the defendant's capacity in the premises.¹²

Review.

The court of appeals reviews for clear error a federal district court's finding that a defendant was competent to waive further proceedings on a habeas corpus petition.¹³ The issue whether a defendant's mental illness affected the defendant's volitional capacity to make a free choice about his options is a question of fact, not of law, and therefore, the trial court's finding that the defendant was competent to waive appeal and postconviction review of his or her death sentence is subject to the clearly erroneous review standard.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Habeas petitioner, who suffered from personality disorder, understood his legal position and options available to him, and thus he would be considered competent to waive habeas review in his capital murder case absent showing that his disorder prevented him from making rational choice among his options; petitioner understood legal posture of his case and reality that he would face execution if he was allowed to withdraw his appeal. [28 U.S.C.A. § 2254](#). [Eggers v. Alabama](#), 876 F.3d 1086 (11th Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

¹ S.C.—[Sims v. State](#), 313 S.C. 420, 438 S.E.2d 253 (1993).

Miranda rights

The defendant made a knowing and voluntary waiver of her rights; the defendant was able to appreciate the circumstances and consequences of giving a statement to law enforcement officers despite the fact that she was not taking her medication, the defendant was advised of her rights and signed a form indicating she understood those rights, a doctor stated that the defendant was competent to waive her *Miranda* rights and make a voluntary statement, and the officers did not observe any abnormal or erratic behavior that would indicate a lack of understanding by the defendant of her rights and the consequences of waiving those rights.

Tenn.—[State v. Dych](#), 227 S.W.3d 21 (Tenn. Crim. App. 2006).

2 Ariz.—[State v. Cornell](#), 179 Ariz. 314, 878 P.2d 1352 (1994).

Ability to make choice

A defendant is not competent to waive constitutional rights if mental illness has substantially impaired his or her ability to make a reasoned choice among the alternatives presented and to understand the nature and consequences of a waiver.

U.S.—[Chavez v. U.S.](#), 656 F.2d 512 (9th Cir. 1981).

3 Ill.—[People v. Johnson](#), 183 Ill. 2d 176, 233 Ill. Dec. 288, 700 N.E.2d 996 (1998).

No per se rule

There is no per se rule of inability to waive constitutional rights based on mental deficiencies.

Pa.—[Com. v. Glover](#), 488 Pa. 459, 412 A.2d 855 (1980).

One factor

Any particular mental defect or deficiency is but one factor in considering whether there has been knowing, voluntary, and intelligent waiver of constitutional rights.

Del.—[Mealey v. State](#), 347 A.2d 651 (Del. 1975).

4 Tenn.—[State v. Dych](#), 227 S.W.3d 21 (Tenn. Crim. App. 2006).

5 Conn.—[State v. Ouellette](#), 271 Conn. 740, 859 A.2d 907 (2004).

S.C.—[Sims v. State](#), 313 S.C. 420, 438 S.E.2d 253 (1993).

6 Conn.—[State v. Woods](#), 297 Conn. 569, 4 A.3d 236 (2010).

Trial by court

The defendant's waiver of the right to a jury trial was knowing, voluntary, and intelligent, in a prosecution for sexual assault and risk of injury to a child; the defendant addressed the trial court personally and stated on the record he wanted a trial before the court in lieu of a trial by jury, his status as a "layman" did not render him incompetent to waive a jury trial, the defendant responded to all questions during the canvass in an intelligible and well-mannered fashion, he stated that he understood the irrevocability of the waiver and that the waiver was voluntary, he was represented by counsel throughout the course of the proceeding, counsel affirmed on record that there was nothing additional to address in the canvass, and the defendant replied to the trial court's inquiries immediately, confirmed that he understood every aspect of the waiver repeatedly, and twice confirmed that he was freely choosing a court trial.

Conn.—[State v. Jeremy D.](#), 149 Conn. App. 583, 90 A.3d 979 (2014), certification denied, 312 Conn. 913, 93 A.3d 596 (2014).

Assistance of counsel

The defendant was competent to waive his right to the assistance of counsel; no evidence indicated that the defendant was unable to understand the nature of the proceedings against him at the time the court granted his request to represent himself, as the defendant addressed the court civilly, and his responses were coherent, and while the defendant had been previously found incompetent to stand trial, the defendant had subsequently been found to be competent, and following such time, the defendant appeared before a number of judges, worked with counsel, and interacted with the prosecutor and others in the criminal justice system, and no one suggested that he again had become incompetent to stand trial.

Conn.—[State v. Caracoglia](#), 95 Conn. App. 95, 895 A.2d 810 (2006).

7 Tex.—[Jackson v. State](#), 391 S.W.3d 139 (Tex. App. Texarkana 2012).

8 Me.—[State v. Kelly](#), 376 A.2d 840 (Me. 1977).

9 Pa.—[Com. v. Pugh](#), 476 Pa. 445, 383 A.2d 183 (1978).

10 Pa.—[Com. v. Pugh](#), 476 Pa. 445, 383 A.2d 183 (1978).

11 Conn.—[State v. Jeremy D.](#), 149 Conn. App. 583, 90 A.3d 979 (2014), certification denied, 312 Conn. 913, 93 A.3d 596 (2014).

12 U.S.—[Cowans v. Bagley](#), 624 F. Supp. 2d 709 (S.D. Ohio 2008), aff'd, 639 F.3d 241 (6th Cir. 2011).

13 U.S.—[Comer v. Schriro](#), 480 F.3d 960 (9th Cir. 2007).

14 Conn.—[State v. Ross](#), 273 Conn. 684, 873 A.2d 131 (2005).

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§ 198. Competence to waive constitutional rights—Waiver by third person

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A fundamental constitutional right may not be waived by a third person.

Due to the long-standing presumption against waiver of fundamental constitutional rights, such rights must be personally waived by the party¹ and may not be waived by his or her attorney² or spouse.³ This is because certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused would call into question the fairness of a criminal trial.⁴ Fundamental rights include the rights to a jury trial,⁵ to protection against double jeopardy and compelled self-incrimination,⁶ to appeal,⁷ to assistance of counsel,⁸ to confront adverse witnesses,⁹ and to testify.¹⁰

Similarly, a person waiving a constitutional right relinquishes or refuses to accept only rights belonging to him or her,¹¹ and he or she cannot affect the rights of third persons.¹² The fact that some members of a class may have so acted as to waive or be

estopped to assert a constitutional right will not estop one who has not so acted from asserting his or her personal constitutional right.¹³

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Footnotes

1 Cal.—[People v. Collins](#), 26 Cal. 4th 297, 109 Cal. Rptr. 2d 836, 27 P.3d 726 (2001).

D.C.—[Boyd v. U.S.](#), 586 A.2d 670, 90 A.L.R.4th 561 (D.C. 1991).

Md.—[Parker v. State](#), 160 Md. App. 672, 866 A.2d 885 (2005).

Tenn.—[State v. Blackmon](#), 984 S.W.2d 589 (Tenn. 1998).

2 Kan.—[State v. Lyons](#), 266 Kan. 591, 973 P.2d 794 (1999).

Md.—[State v. Collins](#), 265 Md. 70, 288 A.2d 163 (1972).

Mich.—[People v. DeGraffenreid](#), 19 Mich. App. 702, 173 N.W.2d 317 (1969).

Attorney's authority to manage conduct of trial

Although there are basic rights that an attorney cannot waive without the fully informed and publicly acknowledged consent of the client, a lawyer has, and must have, full authority to manage the conduct of the trial, and defense counsel could effectively waive the defendant's right to be brought to trial within the 180-day period specified under the Interstate Agreement on Detainers, by agreeing to a trial date outside that time period, even without the express consent by the defendant.

U.S.—[New York v. Hill](#), 528 U.S. 110, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000).

Trial of incompetent defendant

The due process violation inherent in and presumed from the trial of an incompetent defendant cannot be waived, if for no other reason than the incompetence itself, nor may counsel waive that right for the defendant for strategic reasons.

D.C.—[Blakeney v. U.S.](#), 77 A.3d 328 (D.C. 2013), cert. denied, 135 S. Ct. 689, 190 L. Ed. 2d 392 (2014).

3 U.S.—[Gurleski v. U.S.](#), 405 F.2d 253 (5th Cir. 1968).

4 W. Va.—[Pullin v. State](#), 216 W. Va. 231, 605 S.E.2d 803 (2004).

5 Cal.—[People v. Collins](#), 26 Cal. 4th 297, 109 Cal. Rptr. 2d 836, 27 P.3d 726 (2001).

D.C.—[Boyd v. U.S.](#), 586 A.2d 670, 90 A.L.R.4th 561 (D.C. 1991).

Md.—[State v. Torres](#), 86 Md. App. 560, 587 A.2d 582 (1991).

6 Md.—[State v. Torres](#), 86 Md. App. 560, 587 A.2d 582 (1991).

D.C.—[Boyd v. U.S.](#), 586 A.2d 670, 90 A.L.R.4th 561 (D.C. 1991).

7 D.C.—[Boyd v. U.S.](#), 586 A.2d 670, 90 A.L.R.4th 561 (D.C. 1991).

8 D.C.—[Boyd v. U.S.](#), 586 A.2d 670, 90 A.L.R.4th 561 (D.C. 1991).

Md.—[State v. Torres](#), 86 Md. App. 560, 587 A.2d 582 (1991).

9 Md.—[State v. Torres](#), 86 Md. App. 560, 587 A.2d 582 (1991).

D.C.—[Boyd v. U.S.](#), 586 A.2d 670, 90 A.L.R.4th 561 (D.C. 1991).

Fundamental right

Whether a constitutional right is fundamental relates only to whether the defendant must personally waive the right.

Tenn.—[Momon v. State](#), 18 S.W.3d 152 (Tenn. 1999), on reh'g, (Mar. 30, 2000).

11 U.S.—[Watkins v. Fly](#), 136 F.2d 578 (C.C.A. 5th Cir. 1943).

12 U.S.—[Allied Artists Pictures Corp. v. Alford](#), 410 F. Supp. 1348 (W.D. Tenn. 1976).

Privacy rights

The custodian of private information may not waive the privacy rights of persons who are constitutionally guaranteed the protection of privacy.

Cal.—[Board of Trustees v. Superior Court](#), 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1st Dist. 1981).

13 U.S.—[Law v. Mayor and City Council of Baltimore](#), 78 F. Supp. 346 (D. Md. 1948).

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§ 199. Competence to waive constitutional rights—Waiver by minor

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West's Key Number Digest

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A minor may waive his or her constitutional rights.

Although it has been held otherwise,¹ a minor may generally waive his or her constitutional rights in a criminal or delinquency proceeding.² However, where a defendant is a juvenile, the court must proceed with special caution when reviewing a purported waiver of constitutional rights.³ In determining the validity of a juvenile's waiver of constitutional rights through a confession, a court must consider the totality of the circumstances surrounding the confession, including the juvenile's age, education, and degree of experience with law enforcement; the circumstances of questioning; any delay between arrest and confession; and any allegations of coercion or trickery.⁴ The burden is on the State to show beyond a reasonable doubt that a juvenile's waiver of constitutional rights met statutory requirements.⁵

Although some jurisdictions require that a minor have access to the advice of an adult who is interested in the minor's welfare⁶ and who has been informed of and understands the rights being waived⁷ before a waiver will be considered effective, it is not necessary that the minor actually consult with an interested adult as long as he or she was afforded an opportunity to do so.⁸

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Footnotes

- 1 La.—[In re Grand Jury Subpoenas](#), 387 So. 2d 1140 (La. 1980).
- 2 U.S.—[U.S. v. Miller](#), 453 F.2d 634 (4th Cir. 1972).
- Alaska—[State v. F. L. A.](#), 608 P.2d 12 (Alaska 1980).
- Cal.—[People v. Terry](#), 2 Cal. 3d 362, 85 Cal. Rptr. 409, 466 P.2d 961 (1970) (disapproved of on other grounds by, [People v. Carpenter](#), 15 Cal. 4th 312, 63 Cal. Rptr. 2d 1, 935 P.2d 708 (1997)).
- D.C.—[Matter of F. D. P.](#), 352 A.2d 378 (D.C. 1976).
- Ill.—[People v. Sprinkle](#), 56 Ill. 2d 257, 307 N.E.2d 161 (1974).
- Ind.—[Williams v. State](#), 433 N.E.2d 769 (Ind. 1982).
- Mich.—[People v. Simpson](#), 35 Mich. App. 1, 192 N.W.2d 118 (1971).
- Mo.—[State v. White](#), 494 S.W.2d 687 (Mo. Ct. App. 1973).
- N.Y.—[People v. Malinowski](#), 43 A.D.2d 189, 350 N.Y.S.2d 454 (3d Dep't 1973).
- Tex.—[Moreno v. State](#), 510 S.W.2d 116 (Tex. Civ. App. Tyler 1974), writ refused n.r.e., (Sept. 24, 1974).
- W. Va.—[State v. Giles](#), 183 W. Va. 237, 395 S.E.2d 481 (1990).

Comprehension

- (1) The waiver of constitutional rights by a youthful offender is effectuated only when it is shown that the minor comprehended the full significance of the panoply of rights that protect him or her during custodial interrogation.
- Pa.—[Com. v. Smith](#), 472 Pa. 492, 372 A.2d 797 (1977).
- (2) The relevant inquiry, with regard to the question whether a minor knowingly waived his or her constitutional rights, is whether a minor had the ability or capacity to comprehend the meaning and effect of a waiver or statement.
- S.C.—[In re Williams](#), 265 S.C. 295, 217 S.E.2d 719 (1975).

- 3 Mass.—[Com. v. Berry](#), 410 Mass. 31, 570 N.E.2d 1004 (1991).

Close scrutiny

- (1) The waiver of rights by a minor above the age of tender years may be effective but must be closely scrutinized under the totality of the circumstances.
- W. Va.—[State v. Giles](#), 183 W. Va. 237, 395 S.E.2d 481 (1990).
- (2) The court must carefully scrutinize a purported waiver of constitutional rights by a youthful and mentally deficient defendant.
- D.C.—[U.S. v. Blocker](#), 354 F. Supp. 1195 (D.D.C. 1973).
- Conn.—[State v. Turcio](#), 178 Conn. 116, 422 A.2d 749 (1979).
- D.C.—[Matter of D. A. S.](#), 391 A.2d 255 (D.C. 1978).
- Ind.—[Stewart v. State](#), 754 N.E.2d 492 (Ind. 2001).
- Ind.—[Stewart v. State](#), 754 N.E.2d 492 (Ind. 2001).
- Mass.—[Com. v. McCra](#), 427 Mass. 564, 694 N.E.2d 849 (1998).
- Pa.—[Com. v. Smith](#), 472 Pa. 492, 372 A.2d 797 (1977).

Parental consent

- (1) A minor is not conclusively presumed to be incapable of waiving his or her constitutional rights without the consent of a parent.
- Ga.—[Clemson v. State](#), 239 Ga. 357, 236 S.E.2d 663 (1977).
- (2) A juvenile's waiver of a right is not rendered ineffective by the absence of his or her parents.
- Ill.—In [In Interest of Bertrand](#), 65 Ill. App. 3d 703, 22 Ill. Dec. 340, 382 N.E.2d 660 (2d Dist. 1978).
- (3) Where the record does not show that a parent advised the juvenile prior to proceeding without counsel, a waiver of the due process right to counsel is invalid.

Ohio—[In re D.L.](#), 189 Ohio App. 3d 154, 2010-Ohio-1888, 937 N.E.2d 1042 (6th Dist. Ottawa County 2010).

Knowledge of police

The rule that informing a juvenile of his or her *Miranda* rights without providing him or her the opportunity to consult with an interested and informed parent or adult or counsel is ineffectual to waive Fifth Amendment rights applies whether or not the police know that the accused is a juvenile.

Pa.—[Com. v. Markle](#), 475 Pa. 266, 380 A.2d 346 (1977).

7

Mass.—[Com. v. McCra](#), 427 Mass. 564, 694 N.E.2d 849 (1998).

8

Mass.—[Com. v. McCra](#), 427 Mass. 564, 694 N.E.2d 849 (1998).

No meaningful opportunity for consultation

It is possible for an adult to be present during a juvenile's purported waiver of constitutional rights and yet for some reason be disabled such that the juvenile had no opportunity to meaningful consultation concerning the waiver of rights.

Mass.—[Com. v. Berry](#), 410 Mass. 31, 570 N.E.2d 1004 (1991).

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d. Effect of Participation in Proceedings

(1) Civil Proceedings

§ 200. Participation in civil proceedings without objection as waiver of constitutional rights

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  945 to 947

Participation without objection in judicial or quasi-judicial proceedings otherwise unconstitutional may operate as a waiver of the right to assert a constitutional right or to challenge the constitutionality of a statute.

Participation without objection in judicial or quasi-judicial civil proceedings otherwise unconstitutional may operate as a waiver of the right to assert a constitutional right or to challenge the constitutionality of a statute.¹ For instance, a party may waive his or her right to a jury trial in that manner.²

In civil proceedings, the acts of the parties to the litigation which by fair inference acknowledge the validity of a statute are binding and will preclude the parties from attacking the statute as unconstitutional.³ Thus, a party who invokes a statute, or seeks to avail himself or herself of its provisions in a proceeding, may not question the statute's constitutionality⁴ in the same action.⁵ For instance, a person who prosecutes an appeal by virtue of a particular statute is estopped to deny the statute's

constitutionality,⁶ and where the United States has put conditions on its consent to be sued, a plaintiff may not, in a suit brought on that consent, question the constitutionality of the conditions imposed.⁷

However, it has been held that a person proceeding under a statute who has actually received no benefits,⁸ or who proceeded under the statute because of legal compulsion,⁹ is not so estopped. It has also been held that the estoppel doctrine does not preclude a party from attacking the constitutionality of a statute in an independent proceeding.¹⁰ Furthermore, one prosecuting a right of action by virtue of a statute under a particular construction is not estopped to question the constitutionality of the statute when it is later differently construed by the court.¹¹

One who has unsuccessfully invoked the aid of a statute in a proceeding cannot later attack its constitutionality¹² in an appeal from the adverse decision¹³ or in a subsequent proceeding in which the statute previously invoked is involved.¹⁴ On the other hand, a party's unsuccessful assertion in one action of the unconstitutionality of a statute does not estop that party in a subsequent action to assert the validity of the statute.¹⁵

The rule of estoppel applies not only to the plaintiff in a cause but also to a defendant who has claimed a right or benefit under the statute¹⁶ or who has appeared as a party to the suit without objecting to the validity of the statute involved.¹⁷

A person invoking the jurisdiction of a court may not deny the validity of a statute conferring jurisdiction.¹⁸ However, one appearing specially to object to the proceedings of the court as based on an unconstitutional act is not so estopped.¹⁹

While one seeking to enforce one section of a statute or statutes in a proceeding may not urge the invalidity of another section of the same legislative unit, if the invalidity, if established, might also render invalid the section relied on,²⁰ he or she may attack the constitutionality of an independent provision of the statute on which his or her rights do not depend.²¹

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Footnotes

- 1 Ill.—[Shoal Creek Coal Co. v. Industrial Commission](#), 300 Ill. 551, 133 N.E. 218 (1921).
N.J.—[In re Allison's Estate](#), 107 N.J. Eq. 197, 152 A. 6 (Prerog. Ct. 1930).
N.Y.—[Cushman v. McGoldrick](#), 126 N.Y.S.2d 841 (Sup 1953).
Ohio—[Scott v. City of Columbus](#), 109 Ohio St. 193, 2 Ohio L. Abs. 5, 142 N.E. 25 (1923).
Tex.—[Gulf Refining Co. v. Bonin](#), 242 S.W. 776 (Tex. Civ. App. Beaumont 1922).
2 Fla.—[In re Shambow's Estate](#), 153 Fla. 762, 15 So. 2d 837 (1943).
3 U.S.—[U.S. v. Nudelman](#), 104 F.2d 549 (C.C.A. 7th Cir. 1939).
Cal.—[Zeibak v. Nasser](#), 12 Cal. 2d 1, 82 P.2d 375 (1938).
Fla.—[Arex Indem. Co. v. Radin](#), 77 So. 2d 839 (Fla. 1955).
Ill.—[Layton v. Layton](#), 4 Ill. 2d 241, 122 N.E.2d 531 (1954).
Kan.—[Johnson v. Schrepel](#), 144 Kan. 111, 58 P.2d 51 (1936).
Mass.—[Cahalan v. Department of Mental Health](#), 304 Mass. 360, 23 N.E.2d 918 (1939).
N.Y.—[William Brandt & Co. v. Weil](#), 113 Misc. 320, 185 N.Y.S. 497 (Sup 1920).
4 U.S.—[Frost v. Corporation Commission](#), 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929).
Kan.—[Leavenworth-Jefferson Elec. Co-op., Inc. v. Kansas Corp. Com'n](#), 247 Kan. 268, 797 P.2d 874 (1990).
Neb.—[State ex rel. Sileven v. Spire](#), 243 Neb. 451, 500 N.W.2d 179 (1993).
N.C.—[Bailey v. State](#), 348 N.C. 130, 500 S.E.2d 54 (1998).

Certificate of need

A residential retirement center which was denied a certificate of need to add 60 skilled nursing beds to its existing facility was precluded from challenging the constitutionality of the Health Care Certificate of Need

Act, on due process grounds, while seeking an order requiring the issuance of a certificate under the same Act.

Neb.—[Gramercy Hill Enterprises v. State](#), 255 Neb. 717, 587 N.W.2d 378 (1998).

5 Neb.—[In re Interest of Lisa W.](#), 258 Neb. 914, 606 N.W.2d 804 (2000).

6 Conn.—[West v. Egan](#), 142 Conn. 437, 115 A.2d 322 (1955).

D.C.—[Fulton Waterworks Co. v. Bear Lithia Springs Co.](#), 47 App. D.C. 437, 1918 WL 18229 (App. D.C. 1918).

7 R.I.—[De Prete v. Farm Bureau Mut. Auto. Ins. Co.](#), 83 R.I. 10, 111 A.2d 837 (1955).

8 U.S.—[Upchurch Packing Co., Inc. v. U.S.](#), 151 F.2d 983 (C.C.A. 5th Cir. 1945).

9 U.S.—[Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.](#), 58 F.2d 593 (C.C.A. 8th Cir. 1932).

10 U.S.—[New York Life Ins Co v. Armenian-American Building & Loan Ass'n](#), 17 F. Supp. 694 (E.D. Pa. 1937).

11 N.J.—[New Jersey Bell Telephone Co. v. Communications Workers of America, N. J. Traffic Division No. 55, CIO](#), 5 N.J. 354, 75 A.2d 721 (1950).

12 Conn.—[Helbig v. Zoning Commission of Noank Fire Dist.](#), 185 Conn. 294, 440 A.2d 940 (1981).

13 U.S.—[International Steel & Iron Co. v. National Sur. Co.](#), 297 U.S. 657, 56 S. Ct. 619, 80 L. Ed. 961 (1936).

14 U.S.—[United Fuel Gas Co. v. Railroad Commission of Kentucky](#), 278 U.S. 300, 49 S. Ct. 150, 73 L. Ed. 390 (1929).

Me.—[Application of Casco Castle Co.](#), 141 Me. 222, 42 A.2d 43 (1945).

Pa.—[Montgomery County Bar Ass'n v. Rinalducci](#), 329 Pa. 296, 197 A. 924 (1938).

15 Conn.—[Appeal of Holley](#), 110 Conn. 80, 147 A. 300 (1929).

16 Pa.—[Taylor v. Haverford Tp.](#), 299 Pa. 402, 149 A. 639 (1930).

Wis.—[Pera v. Village of Shorewood](#), 176 Wis. 261, 186 N.W. 623 (1922).

17 Conn.—[Coombs v. Larson](#), 112 Conn. 236, 152 A. 297 (1930).

Mo.—[Regan v. Dickmann](#), 207 S.W. 792 (Mo. 1918).

In federal court

18 U.S.—[United Fuel Gas Co. v. Railroad Commission of Kentucky](#), 278 U.S. 300, 49 S. Ct. 150, 73 L. Ed. 390 (1929).

19 Mich.—[Cote v. Village of Highland Park](#), 173 Mich. 201, 139 N.W. 69 (1912).

Idaho—[Henderson v. Twin Falls County](#), 59 Idaho 97, 80 P.2d 801 (1938).

Iowa—[Doyle v. Wilcockson](#), 184 Iowa 757, 169 N.W. 241 (1918).

Kan.—[Willoughby v. Willoughby](#), 178 Kan. 62, 283 P.2d 428 (1955).

Ill.—[Sutter v. People's Gaslight & Coke Co.](#), 284 Ill. 634, 120 N.E. 562 (1918).

Tex.—[Gulf Refining Co. v. Bonin](#), 242 S.W. 776 (Tex. Civ. App. Beaumont 1922).

17 Ill.—[Village of Waynesville v. Pennsylvania R. Co.](#), 354 Ill. 318, 188 N.E. 482 (1933).

Ind.—[Moran v. Miller](#), 198 Ind. 429, 153 N.E. 890 (1926).

18 Mich.—[In re Auditor General](#), 275 Mich. 462, 266 N.W. 464, 107 A.L.R. 279 (1936).

20 Neb.—[Sommerville v. Board of Com'rs of Douglas County](#), 116 Neb. 282, 216 N.W. 815 (1927), aff'd, 117 Neb. 507, 221 N.W. 433 (1928).

21 Tex.—[Baker v. Coman](#), 109 Tex. 85, 198 S.W. 141 (1917).

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(1) Civil Proceedings

§ 201. Waiver of First Amendment rights

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West's Key Number Digest

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Although a party may waive his or her First Amendment rights, he or she does not do so simply by bringing a civil action.

Although a party may waive his or her right of freedom of speech,¹ a plaintiff does not waive his or her First Amendment privileges simply by bringing a civil suit.²

Participation in discovery by itself does not constitute a waiver of First Amendment rights.³ However, the First Amendment rights of litigants in materials produced to them during discovery can be waived if the waiver is knowing and voluntary.⁴

When freedom of speech is at issue, a court will find a waiver only in circumstances that are clear and compelling.⁵

CUMULATIVE SUPPLEMENT

Cases:

To be effective, a government employee's waiver of First Amendment rights, by agreeing to pay agency fee representing proportionate share of union dues attributable to public-sector union's activities as collective-bargaining representative, must be freely given and shown by clear and compelling evidence; unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met. [U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 \(2018\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[In re George F. Nord Bldg. Corp., 129 F.2d 173 \(C.C.A. 7th Cir. 1942\)](#) (a party to a proceeding in which a decree was entered with his consent could not claim that the decree restricted his freedom of speech as he waived that right and consented to limitations on speech within the scope of the decree).
- 2 U.S.—[Grandbouche v. Clancy, 825 F.2d 1463, 8 Fed. R. Serv. 3d 1037 \(10th Cir. 1987\)](#).
- 3 U.S.—[National Polymer Products, Inc. v. Borg-Warner Corp., 641 F.2d 418, 31 Fed. R. Serv. 2d 129 \(6th Cir. 1981\)](#).
- 4 U.S.—[National Polymer Products, Inc. v. Borg-Warner Corp., 641 F.2d 418, 31 Fed. R. Serv. 2d 129 \(6th Cir. 1981\)](#).
- 5 § 196.

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§ 202. Participation in criminal proceedings as waiver of rights, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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An accused in a criminal case can generally waive his or her constitutional rights that are in the nature of personal privileges if the public and the jurisdiction of the court are not affected by the waiver.

A criminal defendant's waiver of his or her constitutional rights may be obtained by express consent or by implication from conduct indicative of consent.¹ The right waived may be any alienable constitutional right,² or any constitutional right which is in the nature of a personal privilege for the defendant's sole benefit,³ if it can be relinquished without affecting the rights of others and without detriment to the public⁴ and without affecting the jurisdiction of the court.⁵

A criminal defendant who has invoked the provisions of a statute⁶ or accepted benefits under it⁷ may not question its constitutionality. Likewise, one who submits to proceedings under a statute or ordinance cannot claim the enactment to be

unconstitutional.⁸ On the other hand, a defendant may not waive those rights in which the State as well as the accused person is interested.⁹

A defendant who has accepted conditions of probation may not subsequently assert that any of the conditions is unconstitutional.¹⁰

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Footnotes

1 U.S.—[Yakus v. U. S.](#), 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944); [Jones v. Marshall](#), 528 F.2d 132 (2d Cir. 1975); U.S. v. Neary, 552 F.2d 1184 (7th Cir. 1977); U.S. v. Friedman, 506 F.2d 511 (8th Cir. 1974).

Alaska—[Davis v. State](#), 501 P.2d 1026 (Alaska 1972).

Fla.—[Maddox v. State](#), 264 So. 2d 34 (Fla. 1st DCA 1972).

Ill.—[People v. Jenkins](#), 41 Ill. 2d 334, 243 N.E.2d 216 (1968).

La.—[State v. Lawrence](#), 260 La. 169, 255 So. 2d 729 (1971).

Md.—[Tichnell v. State](#), 287 Md. 695, 415 A.2d 830 (1980).

Minn.—[State v. Maternowski](#), 297 Minn. 482, 209 N.W.2d 686 (1973).

N.Y.—[People ex rel. Hannon v. Ryan](#), 34 A.D.2d 393, 312 N.Y.S.2d 706 (4th Dep't 1970).

N.C.—[State v. Hutchins](#), 303 N.C. 321, 279 S.E.2d 788 (1981).

Ohio—[State v. Wilson](#), 30 Ohio St. 2d 199, 59 Ohio Op. 2d 220, 283 N.E.2d 632 (1972).

Okla.—[Higgins v. State](#), 1973 OK CR 59, 506 P.2d 575 (Okla. Crim. App. 1973).

Pa.—[Com. v. Lignos](#), 294 Pa. Super. 210, 439 A.2d 824 (1982).

Wash.—[State v. Huckaby](#), 15 Wash. App. 280, 549 P.2d 35 (Div. 2 1976).

Wis.—[Hebel v. State](#), 60 Wis. 2d 325, 210 N.W.2d 695 (1973).

Wyo.—[Six Feathers v. State](#), 611 P.2d 857 (Wyo. 1980).

2 Ga.—[Kitchens v. State](#), 160 Ga. App. 492, 287 S.E.2d 316 (1981).

N.Y.—[People v. Caron](#), 121 N.Y.S.2d 404 (County Ct. 1953).

Okla.—[Perry v. State](#), 1969 OK CR 35, 450 P.2d 230 (Okla. Crim. App. 1969).

3 U.S.—[Parker v. U.S.](#), 184 F.2d 488 (4th Cir. 1950).

Md.—[Bristow v. State](#), 242 Md. 283, 219 A.2d 33 (1966).

N.C.—[State v. Doughtie](#), 238 N.C. 228, 77 S.E.2d 642 (1953).

Okla.—[Miles v. State](#), 1954 OK CR 33, 268 P.2d 290 (Okla. Crim. App. 1954).

4 Okla.—[Eaton v. Gibbons](#), 1966 OK CR 144, 419 P.2d 563 (Okla. Crim. App. 1966).

5 N.Y.—[People v. Caron](#), 121 N.Y.S.2d 404 (County Ct. 1953).

Okla.—[Ex parte Gray](#), 74 Okla. Crim. 200, 124 P.2d 430 (1942).

6 U.S.—[Close v. U.S.](#), 198 F.2d 144 (4th Cir. 1952).

7 Va.—[Bisping v. Com.](#), 218 Va. 753, 240 S.E.2d 656 (1978).

Control release

Forfeiture of control release credits along with the forfeiture of regular gain time upon supervision revocation did not violate the Ex Post Facto Clause, although the releasee committed the underlying criminal offense prior to the effective date of the control release program, where the releasee had voluntarily accepted placement in that program and then violated the terms and conditions of control release; by accepting release under the control release program, the releasee waived any ex post facto claims.

Fla.—[Lewis v. Moore](#), 753 So. 2d 1242 (Fla. 2000).

8 Ill.—[People v. Gibbs](#), 349 Ill. 83, 181 N.E. 628 (1932).

Ky.—[Duncan v. City of Lexington](#), 195 Ky. 822, 244 S.W. 60 (1922).

Mo.—[State v. Forshee](#), 308 Mo. 651, 274 S.W. 419 (1925).

Okla.—[White v. State](#), 23 Okla. Crim. 198, 214 P. 202 (1923).

9 Mo.—[State ex rel. Potts v. Travis](#), 241 S.W.2d 282 (Mo. Ct. App. 1951).

Nev.—[State v. Loveless](#), 62 Nev. 17, 136 P.2d 236 (1943).

Okla.—[Ex parte Gray](#), 74 Okla. Crim. 200, 124 P.2d 430 (1942).

10

Fla.—[Brown v. State, 305 So. 2d 309 \(Fla. 4th DCA 1974\)](#).

Warrantless search

Mont.—[State v. Burke, 235 Mont. 165, 766 P.2d 254 \(1988\)](#).

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§ 203. Effect of guilty plea

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  947

A voluntary and intelligent guilty plea waives all nonjurisdictional defects.

The general rule is that a guilty plea waives all nonjurisdictional defects,¹ including deprivations of federal due process, that occurred before the plea,² but does not necessarily waive all constitutional rights.³ For instance, a plea of guilty to the elements of a criminal offense does not constitute either an admission or a waiver of the defendant's due process rights.⁴ Likewise, a guilty or no-contest plea does not waive the right to contest the facial constitutionality of the statute which is the basis for the conviction.⁵ However, a defendant who pleads no contest to a charge that he or she violated a statute waives his or her right to challenge the statute as applied.⁶

An exception to the general rule that a guilty plea waives all nonjurisdictional defects exists when it can be determined on the face of the record that the court had no power to enter the conviction or impose the sentence.⁷

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Footnotes

1 Idaho—[State v. Manzanares](#), 152 Idaho 410, 272 P.3d 382 (2012) (noting, however, that a defendant may preserve nonjurisdictional defects and issues by entering a conditional guilty plea).

Mo.—[State v. Nunley](#), 341 S.W.3d 611 (Mo. 2011).

2 Tex.—[Ex parte Torres](#), 943 S.W.2d 469 (Tex. Crim. App. 1997).

3 U.S.—[Allen v. VanCantfort](#), 436 F.2d 625 (1st Cir. 1971).

Ariz.—[State v. Cutler](#), 121 Ariz. 328, 590 P.2d 444 (1979); [State v. Popejoy](#), 9 Ariz. App. 170, 450 P.2d 411 (1969).

Speedy trial

A defendant has a right to raise the issue of denial of a speedy trial as a constitutional violation of his or her right to due process following a plea of guilty.

N.Y.—[People v. Rathbun](#), 48 A.D.2d 149, 368 N.Y.S.2d 317 (3d Dep't 1975).

Fifth and Sixth Amendment rights

A criminal defendant who enters a plea of guilty has by definition relinquished his or her Sixth Amendment rights to a trial by jury and to confront the witnesses against the defendant, as well as his or her Fifth Amendment privilege against self-incrimination, and for this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege.

Tex.—[Davison v. State](#), 405 S.W.3d 682 (Tex. Crim. App. 2013), application for writ of habeas corpus held in abeyance, 2014 WL 5372670 (Tex. Crim. App. 2014).

4 Kan.—[State v. Cody](#), 272 Kan. 564, 35 P.3d 800 (2001).

5 U.S.—[Mercado v. Rockefeller](#), 502 F.2d 666 (2d Cir. 1974).

Wis.—[State v. Trochinski](#), 2002 WI 56, 253 Wis. 2d 38, 644 N.W.2d 891 (2002).

Withdrawal of plea

A plea waives all facial constitutional challenges to a statute unless the defendant asks the leave of court to withdraw the plea and files a motion to quash.

Neb.—[State v. Kanarick](#), 257 Neb. 358, 598 N.W.2d 430 (1999).

Plea of no contest

The defendants' plea of no contest under a gender-based law did not preclude them from claiming the statute was unconstitutional as a violation of equal protection.

U.S.—[Country v. Parratt](#), 684 F.2d 588 (8th Cir. 1982).

Conditional guilty plea

A defendant who entered a conditional guilty plea to a charge of recruiting a criminal gang member properly reserved the right to challenge the statute under which she was charged as overbroad under freedom-of-association principles, though the conditional plea agreement did not explicitly refer to any adverse ruling by the trial court, where the district court denied the defendant's motion to dismiss that was predicated on the alleged overbreadth of the statute, and the defendant answered affirmatively at the plea hearing when asked if she was reserving her right to appeal the constitutionality of the statute.

Idaho—[State v. Manzanares](#), 152 Idaho 410, 272 P.3d 382 (2012).

6 Wis.—[State v. Trochinski](#), 2002 WI 56, 253 Wis. 2d 38, 644 N.W.2d 891 (2002).

7 Mo.—[Garris v. State](#), 389 S.W.3d 648 (Mo. 2012), cert. denied, 134 S. Ct. 113, 187 L. Ed. 2d 83 (2013).

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1. Judicial Authority and Duty

a. General Principles

§ 204. Power of court to determine constitutionality

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  955, 961 to 963

A court has the power to determine if a law conforms to the constitution and to declare a statute or government action invalid if it is unconstitutional.

Inherent in a court's power to interpret a constitution is the responsibility to determine whether a law conforms to that constitution.¹ The judiciary has the final authority to determine whether the legislature, in enacting a statute, acted within its constitutional authority or whether governmental action is constitutional.² In a proper case, it is not only the right of the courts but also their duty to consider that question³ and to declare invalid an unconstitutional statute.⁴ Thus, after a constitutional issue has been properly raised in a trial court, the trial court must rule upon the issue.⁵ The courts have the duty to examine the constitutionality of a law, when challenged, as written or applied.⁶ According to some authorities, jurisdiction to pass on the constitutionality of an act of the legislature is inherent in the courts,⁷ but it has been stated elsewhere that the power is not

inherent but arises from the duty to determine the respective rights and liabilities or duties of litigants in a controversy⁸ or to decide the case before the court.⁹

If a statute is clearly invalid, it is the duty of the court to so determine irrespective of the consequences.¹⁰ This obligation exists no matter how desirable or beneficial the legislation may be,¹¹ and notwithstanding any fiat of the legislature that the act is constitutional,¹² or because the legislation was submitted to a referendum procedure,¹³ because the constitution, and not the statute, is the paramount law.¹⁴ When a statute conflicts with a constitutional provision, the statute must fall.¹⁵

The courts have the sole power and duty to determine whether a particular enactment violates the constitution.¹⁶ A court examines whether the legislature has exceeded constitutional limitations on the legislative power,¹⁷ its first task being to ascertain the limitations on legislative authority established by the constitution.¹⁸ While a court gives great deference to legislative pronouncements and upholds their constitutionality when possible, it has an equal duty to declare an enactment invalid if it transgresses the constitution¹⁹ and may not defer to a state legislature when legislative action results in an infringement of constitutional rights.²⁰ Also, the assent of the executive to a bill, which contains a provision contrary to the constitution, does not shield it from judicial review.²¹ However, the courts do not have the substantive power to review and annul properly enacted statutes,²² and a court may consider the issue only when the determination of constitutionality becomes necessary in the course of a proper judicial proceeding, and the issue is sufficiently raised.²³

The power to declare a legislative enactment void is a delicate one.²⁴ It will be exercised cautiously and with reluctance,²⁵ only in clear cases,²⁶ and a court must observe traditional restraints.²⁷ It has been said that the courts are not roving commissions assigned to pass judgment on the validity of the nation's laws.²⁸ Thus, a court's task is limited to determining the validity of the statute²⁹—not to determine whether the legislation is wise but whether it is constitutional.³⁰

CUMULATIVE SUPPLEMENT

Cases:

Before deciding a question of constitutional law, the Supreme Court must find that the question is presented in a case or controversy that is of a Judiciary Nature. [U.S. Const. art. 3, § 2, cl. 1. *Rucho v. Common Cause*, 139 S. Ct. 2484 \(2019\)](#).

A court does not have authority under the canon of constitutional avoidance to avoid questions, even important ones, simply because it might prefer not to answer them. [Trump v. Mazars USA, LLP](#), 940 F.3d 710 (D.C. Cir. 2019).

Statutes are presumed constitutional, and courts' power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. [State v. Fitch](#), 884 N.W.2d 367 (Minn. 2016).

Once the legislative branch has exercised its authority to enact a statute, whether through legislative referendum or a bill signed by the Governor, it is within the courts inherent power to interpret the constitutionality of that statute when called upon to do so. [Driscoll v. Stapleton](#), 2020 MT 247, 473 P.3d 386 (Mont. 2020).

[END OF SUPPLEMENT]

Footnotes

- 1 Mont.—[State v. Walker](#), 2001 MT 170, 306 Mont. 159, 30 P.3d 1099 (2001).
Ascertainment of framers' intent
When a constitutional question is properly presented, it is the court's duty to ascertain and declare the framers' intent and reject any legislative act that is conflict with it.
Haw.—[Application of Ferguson](#), 74 Haw. 394, 846 P.2d 894 (1993).
U.S.—[Woods v. Cloyd W. Miller Co.](#), 333 U.S. 138, 68 S. Ct. 421, 92 L. Ed. 596 (1948); [Canadian Northern Ry. Co. v. Eggen](#), 252 U.S. 553, 40 S. Ct. 402, 64 L. Ed. 713 (1920).
2 Ala.—[Opinion Of The Justices](#), 795 So. 2d 630 (Ala. 2001).
Alaska—[Doe v. State, Dept. of Public Safety](#), 92 P.3d 398 (Alaska 2004).
Ark.—[Lake View School Dist. No. 25 of Phillips County v. Huckabee](#), 351 Ark. 31, 91 S.W.3d 472, 173 Ed. Law Rep. 248 (2002), opinion supplemented, 358 Ark. 137, 189 S.W.3d 1, 209 Ed. Law Rep. 537 (2004).
Iowa—[Rants v. Vilsack](#), 684 N.W.2d 193 (Iowa 2004).
Md.—[Curran v. Price](#), 334 Md. 149, 638 A.2d 93 (1994).
Mich.—[Lewis v. State](#), 464 Mich. 781, 629 N.W.2d 868 (2001).
N.H.—[In re Below](#), 151 N.H. 135, 855 A.2d 459 (2004).
N.C.—[Leandro v. State](#), 346 N.C. 336, 488 S.E.2d 249, 120 Ed. Law Rep. 304 (1997).
R.I.—[In re Advisory Opinion to the Governor](#), 732 A.2d 55 (R.I. 1999).
Wash.—[State v. Gresham](#), 173 Wash. 2d 405, 269 P.3d 207 (2012).
W. Va.—[State ex rel. Blankenship v. Richardson](#), 196 W. Va. 726, 474 S.E.2d 906 (1996).
Wyo.—[V-1 Oil Co. v. State](#), 934 P.2d 740 (Wyo. 1997).
Extent of power
The power of judicial review extends not only to invalidating unconstitutional statutes or other legislative enactments but also to declaring other governmental action invalid if it violates the state or federal constitution.
Mich.—[Sharp v. City of Lansing](#), 464 Mich. 792, 629 N.W.2d 873 (2001).
General or special law
Whether a general law could have been made applicable, and thus a local or special law would be unconstitutional, is a judicial question.
Mo.—[Treadway v. State](#), 988 S.W.2d 508 (Mo. 1999).
3 U.S.—[County Court of Ulster County, N. Y. v. Allen](#), 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979); [Williams v. State of Georgia](#), 349 U.S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955).
Cal.—[People v. Anderson](#), 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972) (rejected on other grounds by, [State v. Ramseur](#), 106 N.J. 123, 524 A.2d 188 (1987)).
Ind.—[Board of Com'r's of Howard County v. Kokomo City Plan Commission](#), 263 Ind. 282, 330 N.E.2d 92 (1975).
Me.—[State v. Bassford](#), 440 A.2d 1059 (Me. 1982).
Ohio—[Board of Ed. of City School Dist. of City of Cincinnati v. Walter](#), 58 Ohio St. 2d 368, 12 Ohio Op. 3d 327, 390 N.E.2d 813 (1979).
Vt.—[State v. Shop and Save Food Markets, Inc.](#), 138 Vt. 332, 415 A.2d 235 (1980).
As to the determination of the constitutionality of legislative regulations under the police power, see §§ 717 et seq.

Implicit in duty

Implicit in the sworn duties of a judge is the duty to determine whether a statute is consistent with the state and federal constitutions when the validity of that statute is properly challenged by the litigants; the judge is under no duty to uphold a legislative enactment found to be in violation of guarantees of either or both constitutions.

N.C.—[State ex rel. Edmisten v. Tucker](#), 312 N.C. 326, 323 S.E.2d 294 (1984).

School funding

A state supreme court had the duty to determine the constitutionality, under a constitutional provision requiring the provision of efficient common schools, of statutes governing the funding of the public school system, upon a challenge to it, although it was claimed that the legislature had exclusive authority to

determine whether the common school system was constitutionally efficient and that a court could not substitute its judgment for that of the legislature; while the presumption of constitutionality given to the legislature's decision was substantial, the judiciary has the ultimate power and duty to apply and interpret the state constitutional section.

Ky.—[Rose v. Council for Better Educ., Inc.](#), 790 S.W.2d 186, 60 Ed. Law Rep. 1289 (Ky. 1989).

4 U.S.—[Haynes v. U.S.](#), 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968).

Ala.—[Peddycoart v. City of Birmingham](#), 354 So. 2d 808 (Ala. 1978).

Ill.—[People v. Purcell](#), 201 Ill. 2d 542, 268 Ill. Dec. 429, 778 N.E.2d 695 (2002).

Kan.—[State v. Cody](#), 272 Kan. 564, 35 P.3d 800 (2001).

Me.—[Orono-Veazie Water Dist. v. Penobscot County Water Co.](#), 348 A.2d 249 (Me. 1975).

Md.—[Galloway v. State](#), 365 Md. 599, 781 A.2d 851 (2001).

N.C.—[Simeon v. Hardin](#), 339 N.C. 358, 451 S.E.2d 858 (1994).

Ohio—[Johnson v. BP Chemicals, Inc.](#), 85 Ohio St. 3d 298, 1999-Ohio-267, 707 N.E.2d 1107 (1999).

Va.—[Terry v. Mazur](#), 234 Va. 442, 362 S.E.2d 904 (1987).

One of highest functions of courts

N.D.—[State v. Birchfield](#), 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).

5 Ga.—[City of Brookhaven v. City of Chamblee](#), 329 Ga. App. 346, 765 S.E.2d 33 (2014), cert. denied, (Mar. 2, 2015).

6 Ind.—[Boehm v. Town of St. John](#), 675 N.E.2d 318 (Ind. 1996).

7 Ariz.—[State Bd. of Barber Examiners v. Edwards](#), 76 Ariz. 27, 258 P.2d 418 (1953).

N.D.—[State ex rel. DeKrey v. Peterson](#), 174 N.W.2d 95 (N.D. 1970).

8 N.C.—[State v. Crabtree](#), 286 N.C. 541, 212 S.E.2d 103 (1975).

9 Ind.—[Indiana Wholesale Wine & Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Com'n](#), 695 N.E.2d 99 (Ind. 1998).

10 Idaho—[State v. Village of Garden City](#), 74 Idaho 513, 265 P.2d 328 (1953).

Me.—[State v. Bassford](#), 440 A.2d 1059 (Me. 1982).

Tex.—[Vick v. Pioneer Oil Co., Western Division](#), 569 S.W.2d 631 (Tex. Civ. App. Amarillo 1978).

11 Idaho—[Jones v. State Bd. of Medicine](#), 97 Idaho 859, 555 P.2d 399 (1976).

Ill.—[Best v. Taylor Mach. Works](#), 179 Ill. 2d 367, 228 Ill. Dec. 636, 689 N.E.2d 1057 (1997).

Me.—[Orono-Veazie Water Dist. v. Penobscot County Water Co.](#), 348 A.2d 249 (Me. 1975).

Efficient, convenient, and useful

The fact that a given law or procedure is efficient, convenient, and useful in facilitating the functions of government, standing alone, will not save it if it is contrary to the Constitution.

U.S.—[Stern v. Marshall](#), 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).

12 Del.—[Opinion of the Justices](#), 385 A.2d 695 (Del. 1978).

W. Va.—[State ex rel. Bumgarner v. Sims](#), 139 W. Va. 92, 79 S.E.2d 277 (1953).

Congressional recital of power

The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.

U.S.—[National Federation of Independent Business v. Sebelius](#), 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012).

13 Mass.—[Opinion of the Justices](#), 365 Mass. 648, 310 N.E.2d 348 (1974).

14 NH.—[Hynes v. Hale](#), 146 N.H. 533, 776 A.2d 722 (2001).

15 La.—[Johnson v. Harrison](#), 150 So. 3d 30 (La. Ct. App. 4th Cir. 2014), writ denied, 148 So. 3d 570 (La. 2014).

Unconstitutional practices

No statute can authorize unconstitutional practices, and when a statute and the constitution conflict, the statute must give way.

N.J.—[Strategic Environmental Partners, LLC v. New Jersey Dept. of Environmental Protection](#), 438 N.J. Super. 125, 102 A.3d 939 (App. Div. 2014).

16 U.S.—[U.S. v. Butler](#), 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914 (1936).

Vt.—[State v. Diamondstone](#), 132 Vt. 303, 318 A.2d 654 (1974).

Wis.—[Warshafsky v. Journal Co.](#), 63 Wis. 2d 130, 216 N.W.2d 197 (1974).

17 N.Y.—[In re Watson's Estate](#), 226 N.Y. 384, 123 N.E. 758 (1919).

As to whether a determination by the judiciary constitutes an encroachment on legislative powers, see §§ 412 et seq.

- 18 S.D.—[In re Davis](#), 2004 SD 70, 681 N.W.2d 452 (S.D. 2004).
- 19 Wyo.—[White v. Fisher](#), 689 P.2d 102 (Wyo. 1984).
- 20 Alaska—[Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice](#), 948 P.2d 963 (Alaska 1997).
- 21 U.S.—[I.N.S. v. Chadha](#), 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).
- 22 U.S.—[Williams v. Riley](#), 280 U.S. 78, 50 S. Ct. 63, 74 L. Ed. 175 (1929).
- 23 Fla.—[State ex rel. Crim v. Juvenal](#), 118 Fla. 487, 159 So. 663 (1935).
- 24 N.C.—[State v. Rooks](#), 207 N.C. 275, 176 S.E. 752 (1934).
- 25 §§ 212 et seq.
- Ind.—[Municipal City of South Bend v. Kimsey](#), 781 N.E.2d 683 (Ind. 2003).
- Me.—[State v. F. H. Vahlsing, Inc.](#), 147 Me. 417, 88 A.2d 144 (1952).
- U.S.—[Rhodes v. Chapman](#), 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981).
- Conn.—[Cefaratti v. Aranow](#), 154 Conn. App. 1, 105 A.3d 265 (2014).
- D.C.—[Smith v. U. S.](#), 445 A.2d 961 (D.C. 1982).
- Fla.—[State ex rel. City of Casselberry v. Mager](#), 356 So. 2d 267 (Fla. 1978).
- Ind.—[Puntney v. Puntney](#), 420 N.E.2d 1283 (Ind. Ct. App. 1981).
- Me.—[State v. Bassford](#), 440 A.2d 1059 (Me. 1982).
- Minn.—[In re Guardianship, Conservatorship of Durand](#), 859 N.W.2d 780 (Minn. 2015).
- N.M.—[Montoya v. Blackhurst](#), 1972-NMSC-058, 84 N.M. 91, 500 P.2d 176 (1972).
- N.D.—[Hoff v. Berg](#), 1999 ND 115, 595 N.W.2d 285 (N.D. 1999).
- R.I.—[Narragansett Indian Tribe v. State](#), 2015 WL 917921 (R.I. 2015).
- Tenn.—[Gates v. Long](#), 172 Tenn. 471, 113 S.W.2d 388 (1938).

Proper performance of judicial function

Federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution; rather, federal courts sit solely to decide on the rights of individuals and must refrain from passing upon the constitutionality of an act unless obliged to do so in the proper performance of their judicial function when the question is raised by a party whose interests entitle him or her to raise it.

U.S.—[Hein v. Freedom From Religion Foundation, Inc.](#), 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424, 44 A.L.R. Fed. 2d 637 (2007).

Free speech

Supreme court uses caution in reviewing claims of constitutionally protected activity and independently scrutinizes the record when free speech arguments are made to see if the charged conduct is protected.

N.D.—[State v. Brossart](#), 2015 ND 1, 858 N.W.2d 275 (N.D. 2015).

Conn.—[Cefaratti v. Aranow](#), 154 Conn. App. 1, 105 A.3d 265 (2014).

Idaho—[Rudeen v. Cenarrusa](#), 136 Idaho 560, 38 P.3d 598 (2001).

Palpable conflict

The power to review legislative enactments may be exercised affirmatively only where legislation under review is in palpable conflict with some plain provision of the constitution.

Miss.—[State v. Watkins](#), 676 So. 2d 247 (Miss. 1996).

N.C.—[State v. Glidden Co.](#), 228 N.C. 664, 46 S.E.2d 860 (1948).

W. Va.—[State ex rel. Cities of Charleston, Huntington and its Counties of Ohio and Kanawha v. West Virginia Economic Development Authority](#), 214 W. Va. 277, 588 S.E.2d 655 (2003).

Judicial restraint

Principles of judicial restraint must be employed before a federal court may declare a state law unconstitutional.

U.S.—[Voting for America, Inc. v. Steen](#), 732 F.3d 382 (5th Cir. 2013).

U.S.—[Kachalsky v. County of Westchester](#), 701 F.3d 81 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806, 185 L. Ed. 2d 812 (2013).

Oklahoma—[Fent v. Oklahoma Capitol Imp. Authority](#), 1999 OK 64, 984 P.2d 200 (Okla. 1999).

Idaho—[Rudeen v. Cenarrusa](#), 136 Idaho 560, 38 P.3d 598 (2001).

Ill.—[Allen v. Woodfield Chevrolet, Inc.](#), 208 Ill. 2d 12, 280 Ill. Dec. 501, 802 N.E.2d 752 (2003).

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Oklahoma.—[State ex rel. Edmondson v. Oklahoma Corp. Com'n](#), 1998 OK 118, 971 P.2d 868 (Okla. 1998), as corrected, (Dec. 10, 1998).

Other considerations

A court's sole duty, when the validity of any statute is challenged, is to ascertain and declare whether it conflicts with the constitution as the paramount law, leaving all other considerations with the legislature and people.

New Hampshire.—[Opinion of the Justices](#), 143 N.H. 429, 725 A.2d 1082, 133 Ed. Law Rep. 172 (1999).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

1. Judicial Authority and Duty

a. General Principles

§ 205. Statutes precluding review

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  961

The legislative intent to preclude judicial review of constitutional issues must be clear.

Congress's intent to preclude judicial review of constitutional claims must be clear.¹ A construction of a statute that would deny all opportunity for a judicial determination of a constitutional right is not favored² unless there is clear and convincing evidence that this was the legislature's intent.³ Where Congress exempts a class of governmental determinations from judicial review, the courts do not acquire jurisdiction to hear challenges to the determinations merely because those challenges are cloaked in constitutional terms.⁴

A heightened showing of congressional intent to preclude judicial review of constitutional claims is required where a statute purports to deny any judicial forum for a colorable constitutional claim.⁵ However, where Congress simply channels judicial review of a constitutional claim to a particular court, the heightened showing is not required; rather, Congress' intent to preclude district court jurisdiction must be fairly discernible in the statutory scheme.⁶

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Footnotes

- 1 U.S.—[Demore v. Kim](#), 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003); [Webster v. Doe](#), 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988).
- 2 U.S.—[Lockerty v. Phillips](#), 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943).
- 3 U.S.—[Chelsea Community Hospital, SNF v. Michigan Blue Cross Ass'n](#), 436 F. Supp. 1050 (E.D. Mich. 1977).
- 4 U.S.—[J.S. v. T'Kach](#), 714 F.3d 99 (2d Cir. 2013).
- 5 U.S.—[Elgin v. Department of Treasury](#), 132 S. Ct. 2126, 183 L. Ed. 2d 1 (2012).
- 6 U.S.—[Elgin v. Department of Treasury](#), 132 S. Ct. 2126, 183 L. Ed. 2d 1 (2012).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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1. Judicial Authority and Duty

a. General Principles

§ 206. Effect of long acquiescence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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While acquiescence in a statute's constitutionality may be a factor justifying a court not considering an attack on it, it does not prevent a court from declaring a statute that clearly contravenes a constitution void.

When an act has been long treated as constitutional and important rights have become dependent on that statute, a court may refuse, except where its unconstitutionality is obvious, to consider an attack on its validity.¹ Long acquiescence in the constitutionality of a statute is a recognition of its constitutionality.² On the other hand, the age of a statute does not give it validity, nor will acquiescence for any length of time, or any amount of practical construction, prevent a court from declaring void a statute that clearly contravenes the constitution³ although it is an element that may be considered and given great weight.⁴ Thus, a longstanding, widespread practice is not immune from constitutional scrutiny, but neither is it to be lightly brushed aside.⁵

Footnotes

- 1 Conn.—[State v. DellaCamera](#), 166 Conn. 557, 353 A.2d 750 (1974).
Ky.—[Wayne Public Library Bd. of Trustees v. Wayne County Fiscal Court](#), 572 S.W.2d 858 (Ky. 1978).
Mich.—[Dearborn Tp. v. Dail](#), 334 Mich. 673, 55 N.W.2d 201 (1952).
N.J.—[Flynn v. Union City](#), 32 N.J. Super. 518, 108 A.2d 629 (App. Div. 1954).
N.Y.—[Brous v. Smith](#), 304 N.Y. 164, 106 N.E.2d 503 (1952).
Pa.—[In re Canvass of Absentee Ballots of 1967 General Election](#), 431 Pa. 165, 245 A.2d 258 (1968).
- 2 Ohio—[Smith v. Goodwill Industries of the Miami Valley, Inc.](#), 130 Ohio App. 3d 437, 720 N.E.2d 203 (2d Dist. Montgomery County 1998).
- 3 Conn.—[State v. DellaCamera](#), 166 Conn. 557, 353 A.2d 750 (1974).
Mass.—[Sears v. Treasurer and Receiver General](#), 327 Mass. 310, 98 N.E.2d 621 (1951).
Mont.—[Brackman v. Kruse](#), 122 Mont. 91, 199 P.2d 971 (1948).
Pa.—[Flynn v. Horst](#), 356 Pa. 20, 51 A.2d 54 (1947).
- 4 [§ 251](#).
- 5 U.S.—[Payton v. New York](#), 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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1. Judicial Authority and Duty

a. General Principles

§ 207. Notice to attorney general

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 957 to 959

Compliance is generally required with statutory requirements that notice be given to the attorney general when the constitutionality of a statute is at issue.

Some statutes or rules of civil procedure require that a person challenging the constitutionality of a statute give notice to the attorney general of the pendency of the action.¹ Some courts have characterized the notice requirement as a jurisdictional condition precedent to a trial court's authority to determine the constitutional issue² while it has been elsewhere stated that the requirement is not jurisdictional, and certain failures to strictly comply may be waived.³ It has also been said that the trial court has a gatekeeper role to inquire whether the notice has been provided to the attorney general and to decide whether to suspend proceeding on a constitutional challenge until the notice has been provided and a response from the attorney general is received and that the court is obligated to ensure compliance with the notice requirement only after the constitutional question has been properly put at issue.⁴

In some states, the notice requirement is limited to declaratory judgment proceedings⁵ although this limitation is not always applied, such as where the constitutional question was raised on a motion to dismiss.⁶ A statute providing that the attorney general must be notified of any declaratory judgment proceeding challenging the constitutionality of a statute applies even when the constitutional issue is collateral to a preliminary step in the litigation.⁷ Other statutes are not limited to declaratory judgment actions.⁸ Some notice statutes apply only to constitutional challenges to statutes, ordinances, and franchises, not to challenges to court rules.⁹

The purpose of the notice requirement is to give the attorney general and the affected agency or officer the opportunity to intervene in the proceeding for the purpose of defending the constitutionality of the statute.¹⁰ It is also said the object of the requirement that the attorney general be served with a copy of proceedings in which a state statute or ordinance is alleged to be unconstitutional is to protect the State and its citizens should the parties be indifferent to the outcome of the litigation.¹¹ The requirement applies, within the context of some provisions, to cases where a political entity is not a party or not otherwise represented.¹² Other statutes apply when the state or a state agency is not a party; where a city is not a state agency for this purpose, the notice must be given.¹³ The requirement that a federal court certify to the attorney general of the State that a state statute affecting the public interest is drawn into question in a case pending in that court¹⁴ applies only when a state, or an agency or officer of the State, is not a party.¹⁵ Also, when a plaintiff challenges a state statute under the state's constitution, not the Federal Constitution, there is no need to certify the challenge to the State Attorney General under the federal statute¹⁶ requiring certification and permitting a state to intervene in an action questioning the constitutionality of a state statute.¹⁷

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Footnotes

- 1 Ala.—[Mathews Realty Co., Inc. v. Dennis](#), 549 So. 2d 481 (Ala. 1989).
Ark.—[Brumley v. Naples](#), 320 Ark. 310, 896 S.W.2d 860 (1995).
Ky.—[Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet](#), 133 S.W.3d 456 (Ky. 2004), as modified, (June 3, 2004).
La.—[Huber v. Midkiff](#), 838 So. 2d 771 (La. 2003).
Miss.—[Donaldson v. Covington County](#), 846 So. 2d 219 (Miss. 2003).
Neb.—[How v. Mars](#), 245 Neb. 420, 513 N.W.2d 511 (1994).
N.J.—[Jordan v. Horsemen's Benev. and Protective Ass'n](#), 90 N.J. 422, 448 A.2d 462 (1982).
R.I.—[Flanagan v. Wesselhoeft](#), 765 A.2d 1203 (R.I. 2001).
S.D.—[West Two Rivers Ranch v. Pennington County](#), 1996 SD 70, 549 N.W.2d 683 (S.D. 1996).
- 2 **Strict compliance generally required**
Ill.—[Kaull v. Kaull](#), 2014 IL App (2d) 130175, 389 Ill. Dec. 271, 26 N.E.3d 361 (App. Ct. 2d Dist. 2014).
Mass.—[Springfield Preservation Trust, Inc. v. Roman Catholic Bishop of Springfield](#), 7 Mass. App. Ct. 895, 387 N.E.2d 211 (1979).
Or.—[Marks v. City of Roseburg](#), 59 Or. App. 558, 651 P.2d 748 (1982).
Tex.—[Commerce Independent School Dist. v. Hampton](#), 577 S.W.2d 740 (Tex. Civ. App. Eastland 1979).
- 3 **Sua sponte ruling**
A trial court's sua sponte decision that a statute is unconstitutional is void unless the attorney general was served with notice and given an opportunity to be heard; however, the court had jurisdiction where the attorney general had been served and did not file any motion indicating that he wished to be heard on the matter.
Ala.—[Ex parte Jefferson County](#), 767 So. 2d 343 (Ala. 2000).
Ill.—[Village of Lake Villa v. Stokovich](#), 211 Ill. 2d 106, 284 Ill. Dec. 360, 810 N.E.2d 13 (2004).
- 4 Tenn.—[In re Adoption of E.N.R.](#), 42 S.W.3d 26 (Tenn. 2001).
- 5 Ga.—[Pelletier v. Northbrook Garden Apartments](#), 233 Ga. 208, 210 S.E.2d 722 (1974).

R.I.—[Snicker's, Inc. v. Young](#), 574 A.2d 1246 (R.I. 1990).

Mandatory only in declaratory judgment action

La.—[Vallo v. Gayle Oil Co., Inc.](#), 646 So. 2d 859 (La. 1994).

Malpractice case

Medical malpractice plaintiffs who asserted that a statute under which their suit was dismissed was unconstitutional did not need to comply with a rule requiring notice to the attorney general in any proceeding where a statute was alleged to be unconstitutional since the rule dealt with declaratory judgment actions.

Mo.—[Mahoney v. Doerhoff Surgical Services, Inc.](#), 807 S.W.2d 503 (Mo. 1991).

Wis.—[Kurtz v. City of Waukesha](#), 91 Wis. 2d 103, 280 N.W.2d 757 (1979).

Wis.—[O'Connell v. Blasius](#), 82 Wis. 2d 728, 264 N.W.2d 561 (1978).

Ala.—[Landers v. O'Neal Steel, Inc.](#), 564 So. 2d 925 (Ala. 1990).

Ark.—[Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.](#), 353 Ark. 701, 120 S.W.3d 525 (2003).

Ill.—[Village of Lake Villa v. Stokovich](#), 211 Ill. 2d 106, 284 Ill. Dec. 360, 810 N.E.2d 13 (2004).

R.I.—[Snicker's, Inc. v. Young](#), 574 A.2d 1246 (R.I. 1990).

As to representation of the State by the attorney general when the validity of a statute is at issue, see [C.J.S., Attorney General § 43](#).

Ariz.—[DeVries v. State](#), 219 Ariz. 314, 198 P.3d 580 (Ct. App. Div. 1 2008).

N.J.—[Weehawken Environment Committee, Inc. v. Weehawken Tp.](#), 161 N.J. Super. 381, 391 A.2d 968 (Law Div. 1978).

Okla.—[Oklahoma Tax Commission v. Smith](#), 1980 OK 74, 610 P.2d 794 (Okla. 1980).

Mont.—[Weinert v. City of Great Falls](#), 2004 MT 168, 322 Mont. 38, 97 P.3d 1079, 29 A.L.R.6th 783 (2004).
[28 U.S.C.A. § 2403\(b\)](#).

Police chief

Under Texas law, a chief of police and police officers are "state officers"; therefore, in a suit in which the chief of police was a party, the court was not required to give notice to the state attorney general that the constitutionality of a state statute was in question.

U.S.—[Spring v. Caldwell](#), 92 F.R.D. 7 (S.D. Tex. 1981).

[28 U.S.C.A. § 2403\(b\)](#).

U.S.—[Gibson v. American Cyanamid Co.](#), 760 F.3d 600 (7th Cir. 2014).

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16 C.J.S. Constitutional Law § 208

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

1. Judicial Authority and Duty

a. General Principles

§ 208. Notice to attorney general—On appeal

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  957 to 959

Notice to an attorney general that the constitutionality of a statute is being challenged may be required on appeal.

Notice to an attorney general that the constitutionality of a statute is being challenged may be required on appeal.¹ An appellate court may decline to rule on the constitutionality of a statute, unless the attorney general has been notified pursuant to a statutory requirement,² or refuse to address the issue in the absence of compliance with an appellate rule requiring that notice of a constitutional issue be given to the court and to the state attorney general.³ Elsewhere, since the failure to give notice does not deprive an appellate court of jurisdiction,⁴ that court will determine the question when it is one of considerable public importance that should be promptly resolved.⁵ The failure of a person to comply with a judicially mandated requirement of notice is not fatal to the jurisdiction of an appellate court where the defect has been cured by notice to the attorney general during the pendency of the appellate proceedings.⁶ Upon a failure to give the required notice to the attorney general, and a finding that the statute at issue raises serious constitutional questions, an appellate court may remand the case for reconsideration of the constitutional issues raised and to afford the parties an opportunity to give appropriate notice to the attorney general.⁷

CUMULATIVE SUPPLEMENT

Cases:

Review of constitutionality of statute providing that the number of peremptory challenges available to a party was to be prescribed by the Supreme Court would be denied, on appeal from defendant's conviction for intentional murder, where defendant failed to provide notice of constitutional challenge to Attorney General. [Ky. Rev. Stat. Ann. §§ 29A.290\(2\)\(b\), 418.075. Craft v. Commonwealth, 483 S.W.3d 837 \(Ky. 2016\)](#).

A notice to the state attorney general was not required of Department of Revenue's argument that tax credit pursuant to which taxpayers could receive a tax credit for their donations to a Student Scholarship Organization (SSO), which could then provide money to a Qualified Education Provider (QEP), was unconstitutional insofar as religiously affiliated private schools were QEPs, which was an argument that Department made in response taxpayer's action challenging Department's rule that excluded religiously affiliated private schools from the definition of a QEP; Department was a state agency, and appellate rule provided that a party challenging the constitutionality of any act of the Legislature in the Supreme Court had to provide the attorney general with notice of the constitutional issue, but only if neither the state nor any state agency was a party to the proceeding. [Mont. Const. art. 10, § 6; Mont. Code Ann. § 15-30-3111; Mont. R. App. P. 27. Espinoza v. Montana Department of Revenue, 2018 MT 306, 393 Mont. 446, 435 P.3d 603 \(2018\)](#).

With regard to petition for evaluation and emergency admission of mental health patient, because petitioner, a psychiatrist, was employed by the State, rule requiring that a party challenging the constitutionality of a statute in a case in which the State, its agency, or its officer or employee is not a party in an official capacity, must give notice to the attorney general, did not apply. [18 U.S.C.A. § 922\(d\)\(4\); NDCC § 62.1-02-01\(1\)\(c\); N.D. R. App. P. 44. In Interest of D.D., 2018 ND 201, 916 N.W.2d 765 \(N.D. 2018\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 Minn.—[Maxwell Communications v. Webb Publishing Co., 518 N.W.2d 830 \(Minn. 1994\)](#).

2 Ark.—[Brumley v. Naples, 320 Ark. 310, 896 S.W.2d 860 \(1995\)](#).

Ky.—[Adventist Health Systems/Sunbelt Health Care Corp. v. Trude, 880 S.W.2d 539 \(Ky. 1994\)](#) (holding modified on other grounds by, [Leanhart v. Humana Inc., 933 S.W.2d 820 \(Ky. 1996\)](#)) and (overruled on other grounds by, [Sisters of Charity Health Systems, Inc. v. Raikes, 984 S.W.2d 464 \(Ky. 1998\)](#)).

Minn.—[Elwell v. Hennepin County, 301 Minn. 63, 221 N.W.2d 538 \(1974\)](#).

N.Y.—[People v. Jones, 122 A.D.3d 549, 997 N.Y.S.2d 413 \(1st Dep't 2014\)](#).

S.D.—[Regalado v. Mathieson, 2004 SD 87, 684 N.W.2d 67 \(S.D. 2004\)](#).

Failure to preserve for appellate review

Ky.—[Johnson v. Commonwealth, 449 S.W.3d 350 \(Ky. 2014\)](#).

Constitutional challenge not clear

An employer's untimely raised First Amendment challenge to the constitutionality of a state statute, providing that truth was justification for libel unless actual malice was proved, was not so clear as would warrant an appellate panel acting sua sponte to strike down the statute, without the employer filing the required notice to the state attorney general, since the employer failed to cite any case law for the proposition that the truth was an absolute defense in private concern suits.

U.S.—[Noonan v. Staples, Inc., 561 F.3d 4 \(1st Cir. 2009\)](#).

3 Mont.—[Weinert v. City of Great Falls, 2004 MT 168, 322 Mont. 38, 97 P.3d 1079, 29 A.L.R.6th 783 \(2004\)](#).

Notice to clerk and service of brief on attorney general

Neb.—[Line v. Line, 228 Neb. 700, 423 N.W.2d 790 \(1988\)](#).

Certification by court

An argument that a statute was unconstitutional was not properly before a state supreme court where the appellant failed to provide the court with a written notice of the existence of a constitutional question so that the clerk could certify the question to the attorney general, in accordance with the applicable court rule.

R.I.—[Gimmicks, Inc. v. Dettore, 612 A.2d 655 \(R.I. 1992\)](#).

4 Ill.—[Kaull v. Kaull, 2014 IL App \(2d\) 130175, 389 Ill. Dec. 271, 26 N.E.3d 361 \(App. Ct. 2d Dist. 2014\)](#).

Miss.—[Hudson v. Moon, 732 So. 2d 927 \(Miss. 1999\)](#).

S.D.—[Johnson v. Powder River Transp., 2002 SD 23, 640 N.W.2d 739 \(S.D. 2002\)](#).

Effect of court rule

A state supreme court's self-imposed rule, creating a duty on a party raising a challenge to the constitutionality of a statute affecting the public interest, to give written notice to the court of that question if the State is not a party to the action, so that the attorney general can intervene, is not jurisdictional; thus, the rule does not prevent the adjudication of a constitutional issue in the absence of official notice.

Vt.—[In re Handy, 171 Vt. 336, 764 A.2d 1226 \(2000\)](#).

5 Minn.—[Elwell v. Hennepin County, 301 Minn. 63, 221 N.W.2d 538 \(1974\)](#).

Pa.—[Lloyd v. Fishinger, 529 Pa. 513, 605 A.2d 1193 \(1992\)](#).

S.D.—[Johnson v. Powder River Transp., 2002 SD 23, 640 N.W.2d 739 \(S.D. 2002\)](#).

6 Wis.—[Matter of Fessler's Estate, 100 Wis. 2d 437, 302 N.W.2d 414 \(1981\)](#) (abrogated on other grounds by, [Matter of Estate of Barthel, 161 Wis. 2d 587, 468 N.W.2d 689 \(1991\)](#)).

Leave to give late notice

An appellate court did not abuse its discretion by permitting late compliance with a rule requiring that a party serve a notice of a constitutional challenge to a statute on the attorney general where the purpose of the rule was fulfilled when the attorney general was offered and declined an opportunity to participate; the court's decision granting leave to give the late notice did not prejudice an adversary, which had long been aware of the constitutional claim and did not seek leave to supplement its brief after learning that the attorney general had been given notice and declined to intervene.

Ill.—[Village of Lake Villa v. Stokovich, 211 Ill. 2d 106, 284 Ill. Dec. 360, 810 N.E.2d 13 \(2004\)](#).

7 R.I.—[Riseberg v. City of Central Falls, 506 A.2d 1371 \(R.I. 1986\)](#).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

1. Judicial Authority and Duty

b. Power of Particular Tribunals

§ 209. Generally; federal and state courts

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  961 to 963

The federal courts have the power to determine whether state and federal legislation violates the U.S. Constitution and may, when their jurisdiction is invoked on other grounds, determine whether a state statute violates the state constitution. State courts are the final arbiters on whether state statutes conflict with the state constitution, and they may also declare those statutes to be in violation of the U.S. Constitution.

The authority to declare a legislative enactment unconstitutional should not be exercised unless the court is both vested with the power and charged with the duty to take that action.¹ While it is the duty of all courts, both state and federal, to uphold and enforce the U.S. Constitution,² it is the special office of the federal courts,³ with final jurisdiction in the United States Supreme Court,⁴ to declare unconstitutional acts of Congress,⁵ acts of state legislatures,⁶ and municipal ordinances⁷ that are in contravention of the U.S. Constitution.

The power of federal courts with regard to the constitutionality of state statutes is generally limited to those that are repugnant to laws or treaties of the United States.⁸ While a state supreme court is the final authority on whether a state statute or ordinance contravenes the state constitution, if a federal court has acquired jurisdiction of the case on other grounds, it will pass on the question whether the act is repugnant to the state constitution⁹ although it will avoid doing so, if possible, when that question has not been decided by the state tribunals.¹⁰ In any event, federal courts are reluctant to declare a state law unconstitutional.¹¹

The supreme court of a state is the final arbiter of the meaning of a state constitution and of a conflict between a state statute and a state constitution.¹² State courts also have the power and duty to determine whether a state statute violates the U.S. Constitution, and to decide other federal constitutional questions,¹³ but may decline to exercise that power.¹⁴ The state courts will not enforce a federal statute, the terms of which are clearly unconstitutional,¹⁵ and a state court may determine the validity of a federal statute when this issue is properly raised and necessary to the determination of the validity of a state statute dependent on it even though the court's decision in this respect is not final.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

When a federal or state law violates the Constitution, the American doctrine of judicial review requires Supreme Court to enforce the Constitution. [Janus v. American Federation of State, County, and Mun. Employees, Council 31](#), 138 S. Ct. 2448 (2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 Cal.—[Miller v. Municipal Court of City of Los Angeles](#), 22 Cal. 2d 818, 142 P.2d 297 (1943).
Ga.—[City of Atlanta v. Universal Film Exchanges](#), 201 Ga. 463, 39 S.E.2d 882 (1946).
Ind.—[Board of Com'r's of Howard County v. Kokomo City Plan Commission](#), 263 Ind. 282, 330 N.E.2d 92 (1975).
Kan.—[Bailey v. Hudspeth](#), 164 Kan. 600, 191 P.2d 894 (1948).
Tex.—[Department of Public Safety v. Buck](#), 256 S.W.2d 642 (Tex. Civ. App. Austin 1953), writ refused.

Only court of competent jurisdiction

Only a court of competent jurisdiction has the power of judicial review and the solemn responsibility to strike down a statute that runs afoul of either federal or state constitution.

N.J.—[In re P.L. 2001, Chapter 362](#), 186 N.J. 368, 895 A.2d 1128 (2006).

Real and substantial constitutional question

When a real and substantial constitutional question is raised, the supreme court has jurisdiction to determine it, and one indication that a claim is real and substantial is if it is one of first impression with the supreme court.

Mo.—[Mayes v. Saint Luke's Hosp. of Kansas City](#), 430 S.W.3d 260 (Mo. 2014).

- 2 U.S.—[Snypp v. State of Ohio](#), 70 F.2d 535 (C.C.A. 6th Cir. 1934).

Colo.—[Zavilla v. Masse](#), 112 Colo. 183, 147 P.2d 823 (1944).

Miss.—[Patton v. State](#), 207 Miss. 120, 41 So. 2d 55 (1949).

N.H.—[Trustees of Phillips Exeter Academy v. Exeter](#), 90 N.H. 472, 27 A.2d 569 (1940).

- 3 U.S.—[Michigan Cent. R. Co. v. Powers](#), 201 U.S. 245, 26 S. Ct. 459, 50 L. Ed. 744 (1906).

- 4 U.S.—[U.S. v. Rumely](#), 345 U.S. 41, 73 S. Ct. 543, 97 L. Ed. 770 (1953); [Polish Nat. Alliance of U.S. v. N.L.R.B.](#), 322 U.S. 643, 64 S. Ct. 1196, 88 L. Ed. 1509 (1944); [Dimick v. Schiedt](#), 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603, 95 A.L.R. 1150 (1935).

- 5 U.S.—[Rosenberg v. U.S.](#), 346 U.S. 273, 73 S. Ct. 1152, 97 L. Ed. 1607 (1953).
6 U.S.—[Shelley v. Kraemer](#), 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R.2d 441 (1948).
7 U.S.—[Moran v. City of New Orleans](#), 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653 (1884).
8 U.S.—[Michigan Cent. R. Co. v. Powers](#), 201 U.S. 245, 26 S. Ct. 459, 50 L. Ed. 744 (1906).
9 U.S.—[Michigan Cent. R. Co. v. Powers](#), 201 U.S. 245, 26 S. Ct. 459, 50 L. Ed. 744 (1906).
10 U.S.—[Asbury Hospital v. Cass County, N. D.](#), 326 U.S. 207, 66 S. Ct. 61, 90 L. Ed. 6 (1945); [Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory](#), 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945); [Spector Motor Service v. McLaughlin](#), 323 U.S. 101, 65 S. Ct. 152, 89 L. Ed. 101 (1944).
11 U.S.—[Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory](#), 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945).
12 U.S.—[Michigan Cent. R. Co. v. Powers](#), 201 U.S. 245, 26 S. Ct. 459, 50 L. Ed. 744 (1906); [Merchants' & Manufacturers' Nat Bank of Pittsburg v. Com. of Pennsylvania](#), 167 U.S. 461, 17 S. Ct. 829, 42 L. Ed. 236 (1897).
Alaska—[Doe v. State, Dept. of Public Safety](#), 92 P.3d 398 (Alaska 2004).
Haw.—[Del Rio v. Crake](#), 87 Haw. 297, 955 P.2d 90 (1998).
Iowa—[Callender v. Skiles](#), 591 N.W.2d 182 (Iowa 1999), as amended on denial of reh'g, (Apr. 12, 1999).
La.—[State v. Peart](#), 621 So. 2d 780 (La. 1993).
N.H.—[In re Below](#), 151 N.H. 135, 855 A.2d 459 (2004).
N.C.—[Corum v. University of North Carolina Through Bd. of Governors](#), 330 N.C. 761, 413 S.E.2d 276, 72 Ed. Law Rep. 652 (1992).
R.I.—[In re Advisory Opinion to the Governor](#), 732 A.2d 55 (R.I. 1999).
Tenn.—[State v. Hayes](#), 188 S.W.3d 505 (Tenn. 2006).
Supreme court exercises plenary review over constitutional issues
Mont.—[Emmerson v. Walker](#), 2010 MT 167, 357 Mont. 166, 236 P.3d 598 (2010).
13 Cal.—[Byers v. Board of Sup'r's of San Bernardino County](#), 262 Cal. App. 2d 148, 68 Cal. Rptr. 549 (4th Dist. 1968).
Ind.—[Flora v. Flora](#), 166 Ind. App. 620, 337 N.E.2d 846 (1975) (disapproved of on other grounds by, [In re Marriage of Boren](#), 475 N.E.2d 690 (Ind. 1985)).
N.C.—[State v. Gurganus](#), 39 N.C. App. 395, 250 S.E.2d 668, 5 A.L.R.4th 700 (1979).
N.D.—[Snyder's Drug Stores, Inc. v. North Dakota State Bd. of Pharmacy](#), 219 N.W.2d 140 (N.D. 1974).
W. Va.—[State ex rel. Hercules Tire & Rubber Supply Co. of W. Va., Wholesale Division of H. & I. Auto Supply Co. v. Gore](#), 152 W. Va. 76, 159 S.E.2d 801 (1968).
14 Or.—[State ex rel. Allen v. Myers](#), 260 Or. 170, 488 P.2d 1184 (1971).
15 Cal.—[Miller v. Municipal Court of City of Los Angeles](#), 22 Cal. 2d 818, 142 P.2d 297 (1943).
Kan.—[Ritchie v. Johnson](#), 158 Kan. 103, 144 P.2d 925 (1944).
16 Mass.—[Howes Bros. Co. v. Massachusetts Unemployment Compensation Com'n](#), 296 Mass. 275, 5 N.E.2d 720 (1936).

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b. Power of Particular Tribunals

§ 210. Inferior courts

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  961 to 963

Inferior courts may have the power to pass on the constitutionality of statutes, but that power is exercised with great caution.

As a general rule, inferior courts, including even those of original jurisdiction, have the power to pass on the validity of a statute and to declare it unconstitutional in proceedings before them.¹ A federal district court has similar powers with respect to determining the constitutionality of a federal rule of civil procedure.² The exercise of this power should be carefully limited, and avoided if possible,³ and a trial court⁴ or a magistrate⁵ may be under more strict limitations in this regard. Unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional,⁶ it is sometimes considered the better practice for the court to assume that it is constitutional, until the contrary is declared by a court of appellate jurisdiction,⁷ especially where the statute is of great importance and far-reaching effect⁸ or has been in effect for an appreciable period of time.⁹ However, some courts have abandoned this practice of assuming the constitutionality of an enactment in the absence of an appellate decision to the contrary, stating that it is the better practice to decide the constitutional issue in the same manner as any other.¹⁰ In a proper

case, an inferior court should not hesitate to determine the constitutionality of a statute if this is necessary.¹¹ A trial court has an affirmative duty to decide the constitutionality of a statute¹² but only in the clearest cases.¹³ In any event, a decision of an inferior court on the constitutionality of a statute is not binding on an appellate court.¹⁴

An inferior court is not deprived of jurisdiction to determine the constitutionality of legislative provisions by virtue of the fact that it may decide the question erroneously.¹⁵

The power to decide cases involving constitutional matters may reside in courts of general jurisdiction.¹⁶ A state may restrict the jurisdiction of a civil court to declare a criminal statute unconstitutional and to enjoin its enforcement.¹⁷ A juvenile court may not have the authority to rule, in a child in need of services proceeding, on the constitutionality of a school policy where the juvenile court has an alternative means of assuring that the child would receive an education.¹⁸

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Footnotes

- 1** U.S.—[Naugle v. State of Okl.](#), 375 F.2d 424 (10th Cir. 1967).
 Ariz.—[State v. Miller](#), 100 Ariz. 288, 413 P.2d 757 (1966).
 Cal.—[People v. Lockheed Shipbuilding & Constr. Co.](#), 35 Cal. App. 3d 776, 111 Cal. Rptr. 106 (2d Dist. 1973).
 Conn.—[Hartford Federal Sav. & Loan Ass'n v. Tucker](#), 192 Conn. 1, 469 A.2d 778 (1984).
 Ga.—[Freeman v. City of Valdosta](#), 119 Ga. App. 345, 167 S.E.2d 170 (1969).
 Ind.—[Board of Com'r's of Howard County v. Kokomo City Plan Commission](#), 263 Ind. 282, 330 N.E.2d 92 (1975).
 Me.—[Small v. Gartley](#), 363 A.2d 724 (Me. 1976).
 Mass.—[School Committee of Springfield v. Board of Ed.](#), 362 Mass. 417, 287 N.E.2d 438 (1972).
 Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
 Tex.—[Passel v. Fort Worth Independent School Dist.](#), 440 S.W.2d 61 (Tex. 1969).
 Wis.—[Moedern v. McGinnis](#), 70 Wis. 2d 1056, 236 N.W.2d 240 (1975).
- Circuit courts**
 Haw.—[HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs](#), 69 Haw. 135, 736 P.2d 1271 (1987).
- Municipal court**
 Wis.—[City of Milwaukee v. Wroten](#), 160 Wis. 2d 207, 466 N.W.2d 861 (1991).
- Lack of determination by higher court**
 Mo.—[State ex rel. Williams v. Marsh](#), 626 S.W.2d 223 (Mo. 1982).
- Statutes governing prosecutor's duties**
 A superior court is empowered to review the constitutionality of statutes that prescribe the duties of the district attorney and to fashion an appropriate remedy should those statutes violate the state constitution even though the district attorney is a constitutional officer.
 N.C.—[Simeon v. Hardin](#), 339 N.C. 358, 451 S.E.2d 858 (1994).
- 2 Admiralty rule**
 U.S.—[Amstar Corp. v. S/S ALEXANDROS T.](#), 664 F.2d 904 (4th Cir. 1981).
 U.S.—[Wilkes v. Internal Revenue Service Jacksonville Dist.](#), 509 F. Supp. 305 (M.D. Fla. 1981).
 N.J.—[State v. Barcheski](#), 181 N.J. Super. 34, 436 A.2d 550 (App. Div. 1981).
 R.I.—[State v. Perry](#), 118 R.I. 89, 372 A.2d 75 (1977).
 Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
 Tex.—[Miller v. Hood](#), 536 S.W.2d 278 (Tex. Civ. App. Corpus Christi 1976), writ refused n.r.e., (Oct. 6, 1976).
 Utah—[Jenkins v. Finlinson](#), 607 P.2d 289 (Utah 1980).
- 3** N.J.—[Blair v. Erie Lackawanna Ry. Co.](#), 124 N.J. Super. 162, 305 A.2d 446 (Law Div. 1973).
- 4**

- 5 S.D.—[Janklow v. Keller](#), 90 S.D. 168, 238 N.W.2d 688 (1976).
- 6 Haw.—[State v. Taylor](#), 49 Haw. 624, 425 P.2d 1014 (1967).
- Minn.—[Head v. Special School Dist. No. 1](#), 288 Minn. 496, 182 N.W.2d 887 (1970) (overruled in part on other grounds by, [Nyhus v. Civil Service Bd.](#), 305 Minn. 184, 232 N.W.2d 779 (1975)).
- N.J.—[State v. Barnes](#), 84 N.J. 362, 420 A.2d 303 (1980).
- Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
- As to the degree of proof required, see § 259.
- 7 Haw.—[State v. Taylor](#), 49 Haw. 624, 425 P.2d 1014 (1967).
- N.J.—[State v. Barnes](#), 84 N.J. 362, 420 A.2d 303 (1980).
- Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
- 8 Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
- 9 Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
- Wis.—[State v. Stehlek](#), 262 Wis. 642, 56 N.W.2d 514 (1953).
- As to the effect of long acquiescence in a statute's constitutionality, see § 206.
- 10 Wis.—[Just v. Marinette County](#), 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
- 11 U.S.—[Griffeth v. Detrich](#), 603 F.2d 118 (9th Cir. 1979).
- Idaho—[Williams v. Paxton](#), 98 Idaho 155, 559 P.2d 1123 (1976).
- Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
- 12 Ind.—[Board of Com'r's of Howard County v. Kokomo City Plan Commission](#), 263 Ind. 282, 330 N.E.2d 92 (1975).
- Wis.—[State v. Johnson](#), 74 Wis. 2d 169, 246 N.W.2d 503 (1976).
- 13 N.J.—[Noyes v. Cohen's Estate](#), 123 N.J. Super. 471, 303 A.2d 605 (Ch. Div. 1973).
- 14 Mich.—[People v. Gebarowski](#), 47 Mich. App. 379, 209 N.W.2d 543 (1973).
- Neb.—[State ex rel. Stenberg v. Moore](#), 258 Neb. 738, 605 N.W.2d 440 (2000).
- Wyo.—[Brenner v. City of Casper](#), 723 P.2d 558 (Wyo. 1986).
- 15 Cal.—[Rescue Army v. Municipal Court of City of Los Angeles](#), 28 Cal. 2d 460, 171 P.2d 8 (1946).
- 16 Iowa—[Iowa Auto. Dealers Ass'n v. Iowa State Appeal Bd.](#), 420 N.W.2d 460 (Iowa 1988).
- 17 Tex.—[State v. Morales](#), 869 S.W.2d 941 (Tex. 1994).
- 18 Mass.—[School Committee of Worcester v. Worcester Div. of Juvenile Court Dept.](#), 410 Mass. 831, 575 N.E.2d 1120, 68 Ed. Law Rep. 1119 (1991).

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Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

1. Judicial Authority and Duty

b. Power of Particular Tribunals

§ 211. Administrative agencies

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 955 to 959

Generally, only courts, rather than administrative agencies, have the power to determine if a law is constitutional.

The determination of the constitutionality of a legislative act usually rests only with the courts and not with a quasi-judicial body¹ or administrative agency.² As a general rule, a challenge to the facial constitutionality of a statute cannot be resolved by an administrative agency.³ Even though a statute may give an administrative body a quasi-judicial function in those matters where it could exercise its expertise, the judiciary must be the final arbiter in matters of substantial constitutional dimension,⁴ and the court must not abdicate to the agency responsibility for determining proper standards of constitutional protection.⁵ Thus, the constitutionality of a statute that empowers an administrative agency is a legal question originally cognizable in court.⁶ However, it has been elsewhere held that an administrative agency may hold a statute unconstitutional during the course of proceedings over which it has jurisdiction because it may not ignore applicable law simply because the source of that law is the state or federal constitution, but like a court,⁷ an agency should not pass on the constitutionality of statutory provisions that are not applicable to the particular controversy.⁸

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Footnotes

- 1 U.S.—[Doe v. Martin](#), 404 F. Supp. 753 (D.D.C. 1975).
N.J.—[Schwartz v. Essex County Board of Taxation](#), 129 N.J.L. 129, 28 A.2d 482 (N.J. Sup. Ct. 1942), judgment aff'd, 130 N.J.L. 177, 32 A.2d 354 (N.J. Ct. Err. & App. 1943).
Ohio—[State ex rel. Park Inv. Co. v. Board of Tax Appeals](#), 32 Ohio St. 2d 28, 61 Ohio Op. 2d 238, 289 N.E.2d 579 (1972).
- 2 U.S.—[Taxation With Representation v. U.S.](#), 585 F.2d 1219 (4th Cir. 1978).
Mich.—[Xerox Corp. v. City of Detroit](#), 64 Mich. App. 159, 235 N.W.2d 173 (1975).
Ohio—[Cleveland Gear Co. v. Limbach](#), 35 Ohio St. 3d 229, 520 N.E.2d 188 (1988).
- 3 Fla.—[Sarnoff v. Florida Dept. of Highway Safety and Motor Vehicles](#), 825 So. 2d 351 (Fla. 2002).
- 4 N.J.—[Valent v. New Jersey State Bd. of Educ.](#), 114 N.J. Super. 63, 274 A.2d 832 (Ch. Div. 1971).
- Ethics commission**
The judicial branch, not an ethics commission, is the ultimate interpreter of the constitution and finally determines the constitutionality of a statute.
R.I.—[In re Advisory Opinion to the Governor](#), 732 A.2d 55 (R.I. 1999).
- Elections**
Lack of statutory or administrative guidelines governing the rotation of candidates' names on voting machines used in general elections did not limit a court's authority to rule on the constitutionality of the only method of voting machine rotation portrayed by the record in a case.
Ohio—[State ex rel. Roof v. Board of Com'rs of Hardin County](#), 39 Ohio St. 2d 130, 68 Ohio Op. 2d 85, 314 N.E.2d 172 (1974).
- 5 U.S.—[Clark v. Board of Ed. of Little Rock School Dist.](#), 374 F.2d 569 (8th Cir. 1967).
- 6 Haw.—[HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs](#), 69 Haw. 135, 736 P.2d 1271 (1987).
As to the need to exhaust administrative remedies, see § 230.
7 §§ 212 et seq.
- 8 Md.—[Insurance Com'r of State of Md. v. Equitable Life Assur. Soc. of U.S.](#), 339 Md. 596, 664 A.2d 862 (1995).

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16 C.J.S. Constitutional Law § 212

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

2. Necessity of Determination

a. General Principles

§ 212. Ruling on constitutionality only when necessary

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  975, 979, 980, 984

As a general rule, a court will rule on the constitutionality of a statute only to the extent that doing so is essential to determine a case.

A longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.¹ Stated simply, courts should avoid constitutional questions whenever possible.² Thus, a court should avoid deciding constitutional issues needlessly³ or unnecessarily⁴ and avoid those questions⁵ unless they are clearly presented,⁶ and the court is required to address them.⁷

Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional interpretation that will have no effect on the outcome of a case.⁸ Thus, it is not the habit of the courts to decide questions of a constitutional nature unless absolutely necessary to a decision of the case⁹ as where the right, or the alleged denial of a right, of a party is founded solely on a statute, the validity of which is attacked.¹⁰ Conversely, the constitutionality of a statute will not be

determined, unless that determination is absolutely necessary for the determination of the merits of the case,¹¹ even though the adversaries seek a constitutional ruling¹² or stipulate that certain questions requiring the determination of a constitutional issue exist.¹³ A state supreme court will not address constitutional issues that are unnecessary for the disposition of the case even though its jurisdiction was invoked on the basis that a constitutional question was involved.¹⁴ Courts depart from this rule only for strong reasons or extraordinary circumstances,¹⁵ involving matters of public importance.¹⁶ However, the confrontation of a constitutional question for the purpose of preserving a congressional enactment, if possible, is proper.¹⁷

While the rule that a court should not pass on constitutional questions unless that adjudication is unavoidable is applicable to the entire federal judiciary, not just to the Supreme Court, this rule does not dictate the Supreme Court's discretionary denial of every certiorari petition raising a novel constitutional question.¹⁸

A constitutional claim may be ceded where there has been substantial compliance with the statute that is being challenged.¹⁹ It is also unnecessary to decide the constitutionality of a statute removing a restriction that was, itself, unconstitutional.²⁰

Some state courts address state constitutional claims before reaching the federal ones²¹ while another reaches the federal constitutional claim first unless it appears that the state provision is distinctive.²²

CUMULATIVE SUPPLEMENT

Cases:

It is important to avoid the premature adjudication of constitutional questions, and courts ought not to pass on questions of constitutionality unless such adjudication is unavoidable. [Matal v. Tam, 137 S. Ct. 1744 \(2017\)](#).

Principles of judicial restraint dictated that the judiciary decline to decide whether the Governor's exercise of his line-item veto power, after a special session was adjourned sine die, on appropriations to the Legislature for its biennial budget violated Separation-of-Powers provision of the Minnesota Constitution by unconstitutionally coercing the Legislature; parties' dispute about coercion essentially asked the court to assess, weigh, and judge the motives of co-equal branches of government engaged in a quintessentially political process, and, because the Legislature had access to appropriated funds that were sufficient to pay the Legislature's estimated expenses and allow it to continue as an independent, functioning branch of state government, it would be able to exercise its constitutional powers under the Minnesota Constitution when it reconvened. [Minn. Const. art. 3, § 1; Minn. Const. art. 4, § 1 et seq. Ninetieth Minnesota State Senate v. Dayton, 903 N.W.2d 609 \(Minn. 2017\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Camreta v. Greene, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 \(2011\)](#).
- 2 Mont.—[Kulstad v. Maniaci, 2010 MT 248, 358 Mont. 230, 244 P.3d 722 \(2010\)](#).
- 3 U.S.—[Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 \(2002\)](#); U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995).

Restraint

A court should exercise self-restraint so as to eschew unnecessary determinations of constitutional questions.
Conn.—[State v. Lemon, 248 Conn. 652, 731 A.2d 271 \(1999\)](#).

- 4 U.S.—[Brandt v. Village of Winnetka, Ill.](#), 612 F.3d 647 (7th Cir. 2010).
Md.—[State v. Callahan](#), 441 Md. 220, 107 A.3d 1143 (2015).
5 U.S.—[Lambrix v. Singletary](#), 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).
Fla.—[State v. Mozo](#), 655 So. 2d 1115 (Fla. 1995).
Mont.—[In re S.H.](#), 2003 MT 366, 319 Mont. 90, 86 P.3d 1027 (2003).
6 Mo.—[J.A.D. v. F.J.D.](#), 978 S.W.2d 336 (Mo. 1998).
Utah—[Lyon v. Burton](#), 2000 UT 19, 2000 UT 55, 5 P.3d 616 (Utah 2000), as modified on denial of reh'g, (June 30, 2000).
8 U.S.—[Ashcroft v. al-Kidd](#), 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).
9 U.S.—[U.S. v. Resendiz-Ponce](#), 549 U.S. 102, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007).
Ill.—[McLean v. Department of Revenue of State of Ill.](#), 184 Ill. 2d 341, 235 Ill. Dec. 3, 704 N.E.2d 352 (1998).
Ind.—[Indiana Ed. Employment Relations Bd. v. Benton Community School Corp.](#), 266 Ind. 491, 365 N.E.2d 752 (1977).
Mass.—[Com. v. Welch](#), 444 Mass. 80, 825 N.E.2d 1005 (2005) (abrogated on other grounds by, [O'Brien v. Borowski](#), 461 Mass. 415, 961 N.E.2d 547 (2012)).
Minn.—[State v. Munger](#), 858 N.W.2d 814 (Minn. Ct. App. 2015).
N.J.—[Strategic Environmental Partners, LLC v. New Jersey Dept. of Environmental Protection](#), 438 N.J. Super. 125, 102 A.3d 939 (App. Div. 2014).
Tenn.—[Hancock v. Board of Professional Responsibility of Supreme Court of Tennessee](#), 447 S.W.3d 844 (Tenn. 2014).
Utah—[Laney v. Fairview City](#), 2002 UT 79, 57 P.3d 1007 (Utah 2002) (holding modified on other grounds by, [Moss v. Pete Suazo Utah Athletic Com'n](#), 2007 UT 99, 175 P.3d 1042 (Utah 2007)).
Wis.—[State ex rel. Thomas v. State](#), 55 Wis. 2d 343, 198 N.W.2d 675 (1972).

First Amendment free speech challenge

In light of the principle that courts should not anticipate a question of constitutional law in advance of the necessity of deciding it, it was not necessary to reach the merits of a facial First Amendment free speech challenge to a state Labor Code provision, before a determination that the provision was valid as applied to an attorney who used the words "Texas" and "Workers' Comp" in the domain name of his website for a blog concerning workers' compensation law, in the attorney's action challenging the Labor Code provision prohibiting the misuse of name of the state Division of Workers' Compensation in connection with any impersonation, advertisement, solicitation, business name, business activity, document, product, or service made or offered by a person regarding workers' compensation coverage or benefits.

- 10 U.S.—[Gibson v. Texas Dept. of Ins.—Div. of Workers' Compensation](#), 700 F.3d 227 (5th Cir. 2012).
U.S.—[U.S. v. Grace](#), 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).
Ala.—[State ex rel. Bland v. St. John](#), 244 Ala. 269, 13 So. 2d 161 (1943).
As to standing requirements, see § 215.
11 U.S.—[Elk Grove Unified School Dist. v. Newdow](#), 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98, 188 Ed. Law Rep. 17 (2004) (abrogated on other grounds by, [Lexmark Intern., Inc. v. Static Control Components, Inc.](#), 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)); [Clinton v. Jones](#), 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997); [Lyng v. Northwest Indian Cemetery Protective Ass'n](#), 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).
Ark.—[Landers v. Jameson](#), 355 Ark. 163, 132 S.W.3d 741, 16 A.L.R.6th 851 (2003).
Cal.—[People v. Brown](#), 31 Cal. 4th 518, 3 Cal. Rptr. 3d 145, 73 P.3d 1137 (2003), as modified, (Oct. 29, 2003).
Conn.—[Kelo v. City of New London](#), 268 Conn. 1, 843 A.2d 500 (2004), aff'd, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).
Ga.—[Bell v. Austin](#), 278 Ga. 844, 607 S.E.2d 569 (2005).
Haw.—[Hawaii Government Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle](#), 124 Haw. 197, 239 P.3d 1 (2010).
Ill.—[People v. Mosley](#), 2015 IL 115872, 2015 WL 728095 (Ill. 2015).
La.—[Denham Springs Economic Development Dist. v. All Taxpayers, Property Owners](#), 894 So. 2d 325 (La. 2005).

Me.—*Town of Burlington v. Hospital Administrative Dist. No. 1*, 2001 ME 59, 769 A.2d 857 (Me. 2001).
Mass.—*Com. v. Welch*, 444 Mass. 80, 825 N.E.2d 1005 (2005) (abrogated on other grounds by, *O'Brien v. Borowski*, 461 Mass. 415, 961 N.E.2d 547 (2012)).
Miss.—*Freeman v. Public Employees' Retirement System of Mississippi*, 822 So. 2d 274 (Miss. 2002).
Mo.—*State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357 (Mo. 2012).
Mont.—*Hughes v. Pullman*, 2001 MT 216, 306 Mont. 420, 36 P.3d 339 (2001).
Neb.—*State v. VanAckeren*, 263 Neb. 222, 639 N.W.2d 112 (2002).
Nev.—*Reel v. Harrison*, 118 Nev. 881, 60 P.3d 480 (2002).
N.H.—*Hughes v. New Hampshire Div. of Aeronautics*, 152 N.H. 30, 871 A.2d 18 (2005).
N.J.—*Randolph Town Center, L.P. v. County of Morris*, 186 N.J. 78, 891 A.2d 1202 (2006).
N.Y.—*Clara C. v. William L.*, 96 N.Y.2d 244, 727 N.Y.S.2d 20, 750 N.E.2d 1068 (2001).
N.C.—*Augur v. Augur*, 356 N.C. 582, 573 S.E.2d 125 (2002).
Ohio—*State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St. 3d 399, 2004-Ohio-6557, 819 N.E.2d 1087 (2004).
Okla.—*In re A.N.O.*, 2004 OK 33, 91 P.3d 646 (Okla. 2004).
R.I.—*WMS Gaming, Inc. v. Sullivan*, 6 A.3d 1104 (R.I. 2010).
S.C.—*In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002).
Tenn.—*State v. Taylor*, 70 S.W.3d 717 (Tenn. 2002).
Tex.—*Leal v. State*, 452 S.W.3d 14 (Tex. App. Houston 14th Dist. 2014).
Va.—*Volkswagen of America, Inc. v. Smit*, 266 Va. 444, 587 S.E.2d 526 (2003).
Wash.—*State v. Rodgers*, 146 Wash. 2d 55, 43 P.3d 1 (2002).

Compromising legal system

Courts should not compromise the stability of the legal system by declaring legislation unconstitutional when the particular case does not require it.

Ill.—*Hearne v. Illinois State Bd. of Educ.*, 185 Ill. 2d 443, 236 Ill. Dec. 12, 706 N.E.2d 886, 144 Ed. Law Rep. 333 (1999).

12 U.S.—*Troy State University v. Dickey*, 402 F.2d 515 (5th Cir. 1968).

La.—*State v. Guidry*, 364 So. 2d 589 (La. 1978).

13 N.C.—*Nicholson v. State Ed. Assistance Authority*, 275 N.C. 439, 168 S.E.2d 401 (1969).

14 Ill.—*Mattis v. State Universities Retirement System*, 212 Ill. 2d 58, 287 Ill. Dec. 541, 816 N.E.2d 303, 192 Ed. Law Rep. 930 (2004).

15 Ariz.—*Aitken v. Industrial Com'n of Arizona*, 183 Ariz. 387, 904 P.2d 456, 104 Ed. Law Rep. 501 (1995).

Me.—*Morris v. Goss*, 147 Me. 89, 83 A.2d 556 (1951).

16 Ark.—*Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

Conn.—*State v. DellaCamera*, 166 Conn. 557, 353 A.2d 750 (1974).

17 U.S.—*Edmond v. U.S.*, 520 U.S. 651, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997).

18 U.S.—*Clinton v. Jones*, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).

19 Tex.—*Birdville Independent School Dist. v. First Baptist Church of Haltom City*, 788 S.W.2d 26, 60 Ed. Law Rep. 245 (Tex. App. Fort Worth 1988), writ denied, (Sept. 6, 1990).

Medical licensing

A state supreme court would not reach the issue of the constitutionality of a statute governing standards that a graduate of a foreign medical school must satisfy to be issued a license to practice where the applicant's medical training qualified him for a medical license under the statute.

Okla.—*Davuluri v. State ex rel. Oklahoma Bd. of Medical Licensure and Supervision*, 2000 OK 45, 10 P.3d 198 (Okla. 2000).

20 S.C.—*Arnold v. Association of Citadel Men*, 337 S.C. 265, 523 S.E.2d 757 (1999).

21 N.H.—*State v. Mitchell*, 166 N.H. 288, 94 A.3d 859 (2014).

Or.—*Strunk v. Public Employees Retirement Bd.*, 338 Or. 145, 108 P.3d 1058 (2005).

Utah—*Whitmer v. City of Lindon*, 943 P.2d 226 (Utah 1997).

Wash.—*State v. Johnson*, 128 Wash. 2d 431, 909 P.2d 293 (1996).

22 N.M.—*State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (1999).

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16 C.J.S. Constitutional Law § 213

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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2. Necessity of Determination

a. General Principles

§ 213. Other ground for decision

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  976

A court will generally not reach a constitutional issue if the case can be determined on some other ground.

Generally, a court will not decide a constitutional question if there is some other nonconstitutional ground upon which to dispose of the case.¹ Constitutional issues will not be addressed until all alternative grounds for relief have been explored.² The alternative grounds include general,³ state,⁴ or local⁵ law, procedural requirements,⁶ and statutory provisions⁷ or rules and regulations.⁸ Thus, statutory issues should be examined before constitutional claims are addressed.⁹ A court may also decline to determine a constitutional question on the ground that the state law has been preempted by federal law.¹⁰ However, a court will not decline to decide the constitutionality of an act of Congress merely because other statutory relief is available to a litigant where it is, at most, speculative.¹¹

Where the issues of both the retroactivity and application of a constitutional doctrine are raised in a case, a court should decide the issue of retroactivity first.¹² Therefore, before a court entertains the question whether the retroactive application of a statute

implicates constitutional concerns, it must first determine that the statute explicitly authorizes the imposition of liability for conduct preceding its enactment.¹³ However, the constitutional question will be addressed where it would remain regardless of whether the statute at issue was to be applied retroactively.¹⁴

To avoid a determination of a constitutional issue, a court may rely on a nonconstitutional ground even if that ground was neither raised by a litigant¹⁵ nor considered by a lower court¹⁶ and even though the parties only presented constitutional arguments.¹⁷ However, the Supreme Court has stated that where the constitutional issues were the only ones litigated below, the fact that a nonconstitutional ground for decision might be buried in the record is not sufficient to invoke the rule that constitutional questions should be avoided.¹⁸

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Footnotes

- ¹ U.S.—[Bond v. U.S.](#), 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); [Northwest Austin Mun. Utility Dist. No. One v. Holder](#), 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009).
 Alaska—[Alaska Trademark Shellfish, LLC v. State](#), 91 P.3d 953 (Alaska 2004).
 Ariz.—[KPNX-TV Channel 12 v. Stephens](#), 236 Ariz. 367, 340 P.3d 1075 (Ct. App. Div. 1 2014).
 Fla.—[Anderson v. City of St. Pete Beach](#), 2014 WL 5151321 (Fla. 2d DCA 2014).
 Ga.—[Garden Club of Georgia v. Shackelford](#), 274 Ga. 653, 560 S.E.2d 522 (2002).
 Idaho—[Serrano v. Four Seasons Framing](#), 157 Idaho 309, 336 P.3d 242 (2014).
 Ill.—[Ultsch v. Illinois Mun. Retirement Fund](#), 226 Ill. 2d 169, 314 Ill. Dec. 91, 874 N.E.2d 1 (2007).
 Ind.—[City of New Haven v. Reichhart](#), 748 N.E.2d 374 (Ind. 2001).
 Iowa—[State v. Kukowski](#), 704 N.W.2d 687 (Iowa 2005).
 Kan.—[Wilson v. Sebelius](#), 276 Kan. 87, 72 P.3d 553 (2003).
 La.—[State v. Mercadel](#), 874 So. 2d 829 (La. 2004).
 Me.—[Hannum v. Board of Environmental Protection](#), 2003 ME 123, 832 A.2d 765 (Me. 2003).
 Md.—[Comptroller of the Treasury v. Zorxit](#), 221 Md. App. 274, 108 A.3d 581 (2015).
 Miss.—[Mississippi Power Co., Inc. v. Mississippi Public Service Com'n](#), 2015 WL 574723 (Miss. 2015).
 N.C.—[Cox v. Cox](#), 768 S.E.2d 308 (N.C. Ct. App. 2014).
 N.H.—[In re Morrill](#), 147 N.H. 116, 784 A.2d 690 (2001).
 N.C.—[James v. Bartlett](#), 359 N.C. 260, 607 S.E.2d 638 (2005).
 Ohio—[State v. Swidas](#), 133 Ohio St. 3d 460, 2012-Ohio-4638, 979 N.E.2d 254 (2012).
 Okla.—[State ex rel. Fent v. State ex rel. Oklahoma Water Resources Bd.](#), 2003 OK 29, 66 P.3d 432 (Okla. 2003).
 Or.—[State v. Nelson](#), 267 Or. App. 621, 341 P.3d 787 (2014).
 Pa.—[Com. v. Hughes](#), 581 Pa. 274, 865 A.2d 761 (2004).
 S.C.—[Riverwoods, LLC v. County of Charleston](#), 349 S.C. 378, 563 S.E.2d 651 (2002).
 Tenn.—[State v. Thompson](#), 151 S.W.3d 434 (Tenn. 2004).
 Tex.—[Wells Fargo Bank, N.A. v. Murphy](#), 58 Tex. Sup. Ct. J. 303, 2015 WL 500636 (Tex. 2015).
 Utah—[Peterson v. Coca-Cola USA](#), 2002 UT 42, 48 P.3d 941 (Utah 2002).
 Wash.—[HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services](#), 148 Wash. 2d 451, 61 P.3d 1141 (2003).
 Wis.—[Waters ex rel. Skow v. Pertzborn](#), 2001 WI 62, 243 Wis. 2d 703, 627 N.W.2d 497 (2001).
 Wyo.—[In re LePage](#), 2001 WY 26, 18 P.3d 1177, 151 Ed. Law Rep. 605, 94 A.L.R.5th 777 (Wyo. 2001).

Statutory claim first

Because a decision for firefighters on their statutory Title VII claim would provide the relief sought in their action alleging violations of Title VII and their equal protection rights, the Supreme Court would consider the statutory claim first.

U.S.—[Ricci v. DeStefano](#), 557 U.S. 557, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009).

- ² U.S.—[Doe v. Mathews](#), 422 F. Supp. 141 (D.D.C. 1976); [Michigan Welfare Rights Organization v. Dempsey](#), 462 F. Supp. 227 (E.D. Mich. 1978).

- 3 U.S.—[State of Tex. v. Grundstrom](#), 404 F.2d 644 (5th Cir. 1968).
W. Va.—[Matter of Hey](#), 192 W. Va. 221, 452 S.E.2d 24 (1994).
- 4 **Basic contract principles applied**
U.S.—[Nicholson v. Rumsfeld](#), 425 F. Supp. 780 (N.D. Tex. 1977).
U.S.—[Ortega Cabrera v. Municipality of Bayamon](#), 562 F.2d 91 (1st Cir. 1977).
Fla.—[Graybar Elec. Co., Inc. v. State, Dept. of Revenue](#), 347 So. 2d 718 (Fla. 3d DCA 1977).
5 U.S.—[Wolston v. Reader's Digest Ass'n, Inc.](#), 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979).
Cal.—[Rancho La Costa, Inc. v. Superior Court](#), 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (2d Dist. 1980).
6 Fla.—[Gallie v. Wainwright](#), 362 So. 2d 936 (Fla. 1978).
La.—[State v. Mercadel](#), 874 So. 2d 829 (La. 2004).
- 7 **Long arm statute**
D.C.—[International Union of Elec., Salaried, Mach., and Furniture Workers, AFL-CIO v. Taylor](#), 669 A.2d 699 (D.C. 1995).
- 8 **Evidence law**
Miss.—[Scott By and Through Scott v. Flynt](#), 704 So. 2d 998 (Miss. 1996).
U.S.—[Blum v. Bacon](#), 457 U.S. 132, 102 S. Ct. 2355, 72 L. Ed. 2d 728 (1982); [Harris v. McRae](#), 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); [Califano v. Yamasaki](#), 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176, 27 Fed. R. Serv. 2d 941 (1979).
Ill.—[Hearne v. Illinois State Bd. of Educ.](#), 185 Ill. 2d 443, 236 Ill. Dec. 12, 706 N.E.2d 886, 144 Ed. Law Rep. 333 (1999).
Ind.—[Indiana Wholesale Wine & Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Com'n](#), 695 N.E.2d 99 (Ind. 1998).
Ky.—[Dawson v. Birenbaum](#), 968 S.W.2d 663 (Ky. 1998).
La.—[Idusuyi v. City of Baton Rouge](#), 770 So. 2d 322 (La. 2000).
Mass.—[Bynum v. Com.](#), 429 Mass. 705, 711 N.E.2d 138 (1999).
Minn.—[Fritz v. State](#), 284 N.W.2d 377 (Minn. 1979).
Ohio—[State v. Gideons](#), 52 Ohio App. 2d 70, 6 Ohio Op. 3d 50, 368 N.E.2d 67 (8th Dist. Cuyahoga County 1977).
Or.—[State v. Anfield](#), 313 Or. 554, 836 P.2d 1337 (1992).
S.C.—[Florence Morning News v. Building Commission of City and County of Florence](#), 265 S.C. 389, 218 S.E.2d 881 (1975).
Vt.—[Goodemote v. Scripture](#), 140 Vt. 525, 440 A.2d 150 (1981).
Wash.—[Tunstall ex rel. Tunstall v. Bergeson](#), 141 Wash. 2d 201, 5 P.3d 691, 146 Ed. Law Rep. 528 (2000).
- 9 **Census**
The Supreme Court would not reach constitutional questions raised by a challenge to a decision of the Department of Commerce to use statistical sampling during a decennial census where the challenge could be resolved on the ground that the proposal violated the Census Act.
U.S.—[Department of Commerce v. U.S. House of Representatives](#), 525 U.S. 316, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999).
U.S.—[Rush v. Smith](#), 573 F.2d 110 (2d Cir. 1978).
- 10 **Bar admission**
U.S.—[Brown v. Supreme Court of Virginia](#), 359 F. Supp. 549 (E.D. Va. 1973), judgment aff'd, 414 U.S. 1034, 94 S. Ct. 533, 38 L. Ed. 2d 327 (1973) and judgment aff'd, 414 U.S. 1034, 94 S. Ct. 534, 38 L. Ed. 2d 327 (1973).
Conn.—[Kelo v. City of New London](#), 268 Conn. 1, 843 A.2d 500 (2004), aff'd, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).
Mont.—[Merlin Myers Revocable Trust v. Yellowstone County](#), 2002 MT 201, 311 Mont. 194, 53 P.3d 1268 (2002).
Wash.—[Willoughby v. Department of Labor and Industries of the State of Wash.](#), 147 Wash. 2d 725, 57 P.3d 611 (2002).
U.S.—[Massachusetts v. Westcott](#), 431 U.S. 322, 97 S. Ct. 1755, 52 L. Ed. 2d 349, 1 Fed. R. Evid. Serv. 1025 (1977).
11 U.S.—[I.N.S. v. Chadha](#), 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).
12 U.S.—[Bowen v. U.S.](#), 422 U.S. 916, 95 S. Ct. 2569, 45 L. Ed. 2d 641 (1975).

- Ohio—[State v. Walls](#), 96 Ohio St. 3d 437, 2002-Ohio-5059, 775 N.E.2d 829 (2002).
- Wash.—[State v. Cruz](#), 139 Wash. 2d 186, 985 P.2d 384 (1999).
- 13 Cal.—[McClung v. Employment Development Dept.](#), 34 Cal. 4th 467, 20 Cal. Rptr. 3d 428, 99 P.3d 1015 (2004).
- 14 Iowa—[Shortridge v. State](#), 478 N.W.2d 613 (Iowa 1991).
- 15 U.S.—[Atlantic Richfield Co. v. U. S. Dept. of Energy](#), 683 F.2d 410 (Temp. Emer. Ct. App. 1980); [Tung Chi Jen v. Immigration and Naturalization Service](#), Los Angeles, Cal., 566 F.2d 1095 (9th Cir. 1977).
- 16 Md.—[McCarter v. State](#), 363 Md. 705, 770 A.2d 195 (2001).
- U.S.—[Allen v. Aytch](#), 535 F.2d 817 (3d Cir. 1976); [Correa v. Clayton](#), 563 F.2d 396 (9th Cir. 1977).
- 17 Or.—[Li v. State](#), 338 Or. 376, 110 P.3d 91 (2005).
- 18 U.S.—[Zobrest v. Catalina Foothills School Dist.](#), 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1, 2 A.D.D. 176, 83 Ed. Law Rep. 930 (1993).

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16 C.J.S. Constitutional Law § 214

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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2. Necessity of Determination

a. General Principles

§ 214. Other ground for decision—Exceptions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  976

Despite the general rule that a court will generally not reach a constitutional issue if the case can be determined on some other ground, exceptions to this rule have been recognized.

Despite the general rule, a court may, in a proper case, pass on a constitutional issue even though another ground of decision is open¹ as where the real purpose of the suit is to test a constitutional question,² which is of public importance³ and requires a determination for the guidance of the courts, public officers, and the public,⁴ such as where there is a conflict among the lower courts on the constitutionality of a particular statute.⁵ This rule is particularly applicable where the court's conclusion is favorable to the constitutionality of a statute,⁶ or the nonconstitutional ground does not favor the party raising the constitutional issues.⁷ A court may address a constitutional issue without resolving statutory claims where the unconstitutionality of the challenged law is conceded by the State.⁸ A court may address a constitutional speedy trial claim before a statutory one where even if the defendant prevailed on the statutory claim, the court would still need to address the constitutional claim because the constitutional remedy is dismissal with prejudice.⁹ A constitutional claim may also be considered before a common-law

doctrine dealing with property rights where the constitutional claim was plainly meritorious, and the common-law doctrine was subject to other constitutional issues and could be modified by legislation.¹⁰

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Footnotes

- 1 Ala.—[State ex rel. Bland v. St. John](#), 244 Ala. 269, 13 So. 2d 161 (1943).
Fla.—[Economy Cash & Carry Cleaners v. Cleaning, Dyeing & Pressing Bd.](#), 128 Fla. 408, 174 So. 829 (1937).
R.I.—[State v. Conragan](#), 54 R.I. 256, 171 A. 326 (1934).
W. Va.—[State v. Harrison](#), 130 W. Va. 246, 43 S.E.2d 214 (1947).
- 2 Ala.—[State ex rel. Bland v. St. John](#), 244 Ala. 269, 13 So. 2d 161 (1943).
Idaho—[Hammond v. Bingham](#), 83 Idaho 314, 362 P.2d 1078 (1961).
Miss.—[State ex rel. Collins v. Jones](#), 106 Miss. 522, 64 So. 241 (1914).
- 3 Del.—[Buckingham v. State ex rel. Killoran](#), 42 Del. 405, 35 A.2d 903 (1944).
Fla.—[Fleeman v. Case](#), 342 So. 2d 815 (Fla. 1976).
- Freedom of expression**
U.S.—[Dombrowski v. Pfister](#), 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).
U.S.—[Bigelow v. Virginia](#), 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).
Mass.—[O'Hara v. Commissioner of Public Safety](#), 367 Mass. 376, 326 N.E.2d 308 (1975).
Wis.—[Milwaukee Professional Firefighters, Local 215, IAFF, AFL-CIO v. City of Milwaukee](#), 78 Wis. 2d 1, 253 N.W.2d 481 (1977).
- First Amendment issue**
A ruling on the constitutionality of a state obscenity statute was advisable, even though the evidence was suppressed in the particular defendant's obscenity trial, where one circuit court had declared the statute unconstitutional, and the State joined in the defendant's plea for a decision on its constitutionality.
Haw.—[State v. Bumanglag](#), 63 Haw. 596, 634 P.2d 80 (1981).
- 5 Fla.—[Sullivan v. Sapp](#), 866 So. 2d 28 (Fla. 2004).
- 6 Ala.—[State ex rel. Bland v. St. John](#), 244 Ala. 269, 13 So. 2d 161 (1943).
Me.—[Bolduc v. Pinkham](#), 148 Me. 17, 88 A.2d 817 (1952).
S.C.—[Floyd v. Thornton](#), 220 S.C. 414, 68 S.E.2d 334 (1951).
- 7 Fla.—[Curless v. Clay County](#), 395 So. 2d 255 (Fla. 1st DCA 1981).
- 8 Minn.—[In re Candidacy of Independence Party Candidates Moore v. Kiffmeyer](#), 688 N.W.2d 854 (Minn. 2004).
- 9 Or.—[State v. Harberts](#), 331 Or. 72, 11 P.3d 641 (2000).
- 10 Conn.—[Leydon v. Town of Greenwich](#), 257 Conn. 318, 777 A.2d 552 (2001).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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2. Necessity of Determination

a. General Principles

§ 215. Standing

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  975, 980

A litigant must establish standing to raise a constitutional issue in the sense that his or her rights would be prejudicially affected if a challenged statute is enforced.

The rules on standing are enforced so that the courts do not adjudicate constitutional issues unnecessarily.¹ The standing doctrine is consistent with notions of judicial restraint and ensures that courts refrain from issuing advisory opinions, that cases be ripe for decision and not moot, and that issues be fully developed between true adversaries.² The constitutionality of a statute may be challenged and determined only where judicially cognizable rights are being, or are about to be, prejudicially affected by the application or enforcement of the statute.³ Accordingly, it is unnecessary to determine the constitutionality of a statute where the rights of the complaining party would not be materially affected by the determination.⁴ The constitutionality of a regulation may not be challenged if the petitioner would not be entitled to greater benefits even if the court ruled that the particular regulation was invalid.⁵ A criminal defendant similarly lacks standing to challenge an ordinance on vagueness grounds where the defendant engaged in conduct that was clearly prohibited under the ordinance.⁶ However, a court may reach a constitutional

question, even though a statute was constitutional as applied to a party, where the issue whether the statute was constitutional is likely to arise again.⁷

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Footnotes

- 1 Wis.—[State v. Jorgensen](#), 2003 WI 105, 264 Wis. 2d 157, 667 N.W.2d 318 (2003).
School policy
A student challenging, on state constitutional grounds, a high school's policy regarding unauthorized student newspapers is required to present evidence that she was or would be enrolled in the high school and intended to write for or distribute a publication that would be affected by that policy.
- 2 Or.—[Barcik v. Kubiacyk](#), 321 Or. 174, 895 P.2d 765, 100 Ed. Law Rep. 759 (1995).
Ariz.—[Bennett v. Brownlow](#), 211 Ariz. 193, 119 P.3d 460 (2005).
As to issuance of advisory opinions, see §§ 218 to 221.
As to moot cases or questions, see §§ 222 to 225.
- 3 U.S.—[Golden v. Zwickler](#), 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969); [Alabama Power Co. v. Ickes](#), 302 U.S. 464, 58 S. Ct. 300, 82 L. Ed. 374 (1938); [Williams v. Riley](#), 280 U.S. 78, 50 S. Ct. 63, 74 L. Ed. 175 (1929).
Cal.—[People v. Navarro](#), 7 Cal. 3d 248, 102 Cal. Rptr. 137, 497 P.2d 481 (1972).
Conn.—[Collins v. York](#), 159 Conn. 150, 267 A.2d 668 (1970).
Minn.—[Application of Dengler](#), 287 N.W.2d 637 (Minn. 1979).
Ohio—[State ex rel. Ohio Academy of Trial Lawyers v. Sheward](#), 86 Ohio St. 3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (1999).
Okla.—[Rath v. Maness](#), 1970 OK 111, 470 P.2d 1011 (Okla. 1970).
Tex.—[Matter of R—E—W—](#), 545 S.W.2d 573 (Tex. Civ. App. Houston 1st Dist. 1976), writ refused n.r.e., (May 11, 1977).
- 4 **Direct injury**
A party may challenge the constitutionality of a statutory provision only if that party has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement.
Ill.—[People v. Hamm](#), 149 Ill. 2d 201, 172 Ill. Dec. 179, 595 N.E.2d 540 (1992) (overruled on other grounds by, [People v. Sharpe](#), 216 Ill. 2d 481, 298 Ill. Dec. 169, 839 N.E.2d 492 (2005)).
U.S.—[Lockerty v. Phillips](#), 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943).
Ala.—[Kirby v. City of Anniston](#), 720 So. 2d 887 (Ala. 1998).
Ill.—[Chicago Teachers Union, Local 1 v. Board of Educ. of City of Chicago](#), 189 Ill. 2d 200, 244 Ill. Dec. 26, 724 N.E.2d 914, 144 Ed. Law Rep. 547 (2000).
Ind.—[Saloom v. Holder](#), 158 Ind. App. 177, 304 N.E.2d 217 (1973).
Md.—[Kerr v. Kerr](#), 287 Md. 363, 412 A.2d 1001 (1980).
Mich.—[City of Center Line v. 37th Dist. Court Judges](#), 403 Mich. 595, 271 N.W.2d 526 (1978).
R.I.—[State v. Perry](#), 118 R.I. 89, 372 A.2d 75 (1977).
Tex.—[Cook v. Wofford](#), 458 S.W.2d 653 (Tex. 1970).
- 5 N.Y.—[Padilla v. Wyman](#), 34 N.Y.2d 36, 356 N.Y.S.2d 3, 312 N.E.2d 149 (1974).
6 Neb.—[State v. Hookstra](#), 263 Neb. 116, 638 N.W.2d 829 (2002).
7 S.D.—[Steinkruger v. Miller](#), 2000 SD 83, 612 N.W.2d 591 (S.D. 2000).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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2. Necessity of Determination

a. General Principles

§ 216. Construction of statute making determination unnecessary

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  975, 976, 994

The construction of a statute may make it unnecessary to address its constitutionality, but a court should not strain the construction to avoid a constitutional issue.

A determination of the constitutionality of a statute may be avoided by a construction of the statute that makes the constitutional determination unnecessary.¹ However, this canon does not apply if there is no statutory ambiguity.² Although a court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.³ A court may not press statutory construction to the point of disingenuous evasion, to avoid a constitutional question.⁴

CUMULATIVE SUPPLEMENT

Cases:

The constitutional avoidance doctrine has no application in the absence of ambiguity in a statute. [Department of Homeland Security v. Thuraissigiam](#), 140 S. Ct. 1959 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Zobrest v. Catalina Foothills School Dist.](#), 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1, 2 A.D.D. 176, 83 Ed. Law Rep. 930 (1993); [U.S. v. Security Indus. Bank](#), 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235, 35 U.C.C. Rep. Serv. 1 (1982); [U. S. v. Clark](#), 445 U.S. 23, 100 S. Ct. 895, 63 L. Ed. 2d 171 (1980). Ariz.—[Petolicchio v. Santa Cruz County Fair and Rodeo Ass'n, Inc.](#), 177 Ariz. 256, 866 P.2d 1342 (1994). Ark.—[State v. Torres](#), 309 Ark. 422, 831 S.W.2d 903 (1992). Ind.—[Indiana Wholesale Wine & Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Com'n](#), 695 N.E.2d 99 (Ind. 1998). Kan.—[Boyd v. Barton Transfer & Storage, Inc.](#), 2 Kan. App. 2d 425, 580 P.2d 1366 (1978). Me.—[Clardy v. Town of Livermore](#), 403 A.2d 779 (Me. 1979). Mass.—[Massachusetts Prisoners Ass'n Political Action Committee v. Acting Governor](#), 435 Mass. 811, 761 N.E.2d 952 (2002). N.H.—[New Hampshire Ins. Co. v. Duvall](#), 115 N.H. 215, 337 A.2d 533 (1975). Okla.—[Neumann v. Tax Commission](#), 1979 OK 64, 596 P.2d 530 (Okla. 1979). Pa.—[Com. v. Staley](#), 476 Pa. 171, 381 A.2d 1280 (1978). R.I.—[Hometown Properties, Inc. v. Fleming](#), 680 A.2d 56 (R.I. 1996). S.D.—[City of Chamberlain v. R.E. Lien, Inc.](#), 521 N.W.2d 130 (S.D. 1994). Vt.—[State v. Read](#), 165 Vt. 141, 680 A.2d 944 (1996). W. Va.—[State ex rel. Harris v. Calendine](#), 160 W. Va. 172, 233 S.E.2d 318 (1977). Wis.—[Matter of Guardianship of Shaw](#), 87 Wis. 2d 503, 275 N.W.2d 143 (Ct. App. 1979). Wyo.—[Umbach v. State](#), 2002 WY 42, 42 P.3d 1006 (Wyo. 2002). As to the construction of a statute to sustain its constitutionality, see § 247.

Plain meaning

Consideration of the constitutionality of a statute may be avoided if its plain meaning avoids any constitutional problem.

- U.S.—[Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary](#), 651 F.2d 277 (5th Cir. 1981).

2 U.S.—[U.S. v. Oakland Cannabis Buyers' Co-op.](#), 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

3 U.S.—[Holder v. Humanitarian Law Project](#), 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355, 49 A.L.R. Fed. 2d 567 (2010).

4 U.S.—[Salinas v. U.S.](#), 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997); [Seminole Tribe of Florida v. Florida](#), 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); [Jean v. Nelson](#), 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985); [U.S. v. Locke](#), 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985).

Inferences

The court may not pile inference upon inference in order to sustain congressional action under Article I of the Constitution.

- U.S.—[U.S. v. Comstock](#), 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878, 65 A.L.R. Fed. 2d 667 (2010).

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a. General Principles

§ 217. Breadth of pronouncement

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  975

A constitutional issue should be decided in connection with its application to the facts, and the rule should not be more broad than that necessitated by the precise situation.

A court does not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground.¹ A court will decide a constitutional issue only in connection with its application to the particular facts.² The court will ordinarily inquire into the constitutionality of a statute only to the extent required by the case before it³ and will not formulate a rule broader than that necessitated by the precise situation to which the rule is to be applied.⁴

Where a case may be decided by the determination of one constitutional question, another constitutional question presented in the case need not be considered.⁵ Accordingly, the Supreme Court will first consider the narrowest of alternate grounds submitted in support of a claim that a statute is unconstitutional.⁶ Similarly, a decision of a case on the basis of a portion of a

statute makes it unnecessary to determine the constitutionality of another portion of the statute,⁷ particularly where that other portion is severable.⁸

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Footnotes

1 U.S.—[Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.](#), 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999).

2 U.S.—[Clinton v. Jones](#), 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997); [American Bond & Mortgage Co. v. U.S.](#), 282 U.S. 374, 51 S. Ct. 118, 75 L. Ed. 395 (1931).

Conn.—[City Recycling, Inc. v. State](#), 247 Conn. 751, 725 A.2d 937 (1999).

La.—[Blanchard v. State Through Parks and Recreation Com'n](#), 673 So. 2d 1000 (La. 1996).

Minn.—[State v. Wolf](#), 605 N.W.2d 381 (Minn. 2000).

Issue speculative

A court would not decide whether a statute holding a husband liable for his wife's debt was based on an unconstitutional gender-based classification, in violation of the Equal Protection Clause, where the issue was ill-defined and speculative under the facts of the case.

Ky.—[Priestley v. Priestley](#), 949 S.W.2d 594 (Ky. 1997).

3 U.S.—[United Public Workers of America \(C.I.O.\) v. Mitchell](#), 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947); [Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory](#), 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945); [Village of Euclid, Ohio v. Ambler Realty Co.](#), 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).

Ala.—[Rainey v. Ford Motor Credit Co.](#), 294 Ala. 139, 313 So. 2d 179, 16 U.C.C. Rep. Serv. 1436 (1975).

Cal.—[People v. Orozco](#), 266 Cal. App. 2d 507, 72 Cal. Rptr. 452, 32 A.L.R.3d 1429 (2d Dist. 1968).

D.C.—[Banks v. Ferrell](#), 411 A.2d 54 (D.C. 1979).

Md.—[Maryland Theatrical Corp. v. Brennan](#), 180 Md. 377, 24 A.2d 911 (1942).

Mass.—[Attorney General v. Inhabitants of Town of Dover](#), 327 Mass. 601, 100 N.E.2d 1 (1951).

N.Y.—[People v. Terra](#), 303 N.Y. 332, 102 N.E.2d 576 (1951).

N.C.—[Bulova Watch Co., Inc. v. Brand Distributors of North Wilkesboro, Inc.](#), 285 N.C. 467, 206 S.E.2d 141 (1974).

First Amendment

The involvement of the First Amendment in a case does not affect the rule that a federal court should not extend its invalidation of statute further than necessary to dispose of a case before it.

U.S.—[Brockett v. Spokane Arcades, Inc.](#), 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

Search for new constitutional questions

When a single question of constitutionality is presented, the Supreme Court will not search for different constitutional questions but will refrain from passing on the constitutionality of a phase of a statute until the stage has been reached where a decision on the precise constitutional issue is necessary.

U.S.—[U.S. v. Spector](#), 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952).

4 U.S.—[McConnell v. Federal Election Com'n](#), 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (overruled on other grounds by, [Citizens United v. Federal Election Com'n](#), 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)); [Clinton v. Jones](#), 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997); [Brockett v. Spokane Arcades, Inc.](#), 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

Conn.—[City Recycling, Inc. v. State](#), 247 Conn. 751, 725 A.2d 937 (1999).

Ill.—[Lorton v. Brown County Community Unit School Dist. No. 1](#), 35 Ill. 2d 362, 220 N.E.2d 161 (1966).

Me.—[Rideout v. Riendeau](#), 2000 ME 198, 761 A.2d 291 (Me. 2000).

N.Y.—[Peters v. New York City Housing Authority](#), 307 N.Y. 519, 121 N.E.2d 529 (1954).

N.C.—[Rice v. Rigsby](#), 259 N.C. 506, 131 S.E.2d 469 (1963).

N.D.—[Glaspie v. Little](#), 1997 ND 108, 564 N.W.2d 651 (N.D. 1997).

W. Va.—[Kolvek v. Napple](#), 158 W. Va. 568, 212 S.E.2d 614 (1975).

Broad pronouncement

Courts need not make broad pronouncements as to the meaning of the constitution when a case can be fully resolved on a narrower ground.

La.—[State ex rel. RT, 781 So. 2d 1239 \(La. 2001\)](#).

5 U.S.—[Wood v. Georgia, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 \(1981\)](#).

Fla.—[Palm Beach Mobile Homes, Inc. v. Strong, 300 So. 2d 881 \(Fla. 1974\)](#).

Iowa—[In Interest of C.S., 516 N.W.2d 851 \(Iowa 1994\)](#).

Wis.—[Thorp v. Town of Lebanon, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59 \(2000\)](#).

6 U.S.—[Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 \(1995\)](#).

7 U.S.—[U.S. v. Spector, 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 \(1952\)](#).

Colo.—[Board of County Com'rs of Jefferson County v. City and County of Denver, 194 Colo. 252, 571 P.2d 1094 \(1977\)](#).

Miss.—[Jackson Redevelopment Authority v. King, Inc., 364 So. 2d 1104 \(Miss. 1978\)](#).

Nev.—[Nevada State Bd. of Dental Examiners v. Toogood, 97 Nev. 255, 628 P.2d 301 \(1981\)](#).

N.D.—[In Interest of R. H., 262 N.W.2d 719 \(N.D. 1978\)](#).

R.I.—[State v. Lemme, 104 R.I. 416, 244 A.2d 585 \(1968\)](#).

Tenn.—[State v. Murray, 480 S.W.2d 355 \(Tenn. 1972\)](#).

Wis.—[Schmidt v. Department of Resource Development, 39 Wis. 2d 46, 158 N.W.2d 306 \(1968\)](#).

Catch-all provision

Where a license revocation had been based on specific grounds enumerated in a statute, it was unnecessary to determine the constitutionality of a catch-all ground, which authorized the denial of a license for "any other good and sufficient reason."

Nev.—[Kochendorfer v. Board of County Com'rs of Douglas County, 93 Nev. 419, 566 P.2d 1131 \(1977\)](#).

8 U.S.—[U.S. v. Harriss, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 \(1954\)](#).

Mo.—[State ex rel. State Bd. of Mediation v. Pigg, 362 Mo. 798, 244 S.W.2d 75 \(1951\)](#).

N.M.—[Nall v. Baca, 1980-NMSC-138, 95 N.M. 783, 626 P.2d 1280 \(1980\)](#).

N.D.—[State v. Williams, 150 N.W.2d 844 \(N.D. 1967\)](#).

Or.—[Castle v. Gladden, 201 Or. 353, 270 P.2d 675 \(1954\)](#).

Pa.—[Sablosky v. Messner, 372 Pa. 47, 92 A.2d 411 \(1952\)](#).

S.D.—[City of Pierre v. Russell, 89 S.D. 70, 228 N.W.2d 338 \(1975\)](#).

16 C.J.S. Constitutional Law § 218

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

2. Necessity of Determination

b. Premature or Abstract Questions

§ 218. Decision on premature or abstract questions, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  978 to 982

Courts generally will not determine premature or abstract constitutional questions except where the exercise of a constitutional right might be chilled if there is not a prompt decision.

A court does not anticipate a question of constitutional law in advance of the necessity of deciding it¹ and, when necessary, then only in a clearly defined factual setting.² Since it is not assumed that an official body will act unconstitutionally or improperly,³ courts will generally refrain from deciding constitutional questions prematurely.⁴ Furthermore, constitutional questions will not be determined abstractly, or in a hypothetical case,⁵ by means of an advisory opinion,⁶ and a constitutional controversy cannot be manufactured in order to obtain an advisory opinion.⁷ As a consequence, the matter will generally not be considered if no injury has as yet resulted from the application of the statute nor any right threatened⁸ or where it is not certain that the statute will be applied to the complaining party.⁹ A constitutional challenge is ripe where a government decision is imminent

and potentially harmful¹⁰ or a sufficient threat¹¹ to a person's constitutional rights. In the First Amendment context, the ripeness review is at its most charitable, and should any significant doubt prevail, it will be resolved in favor of justiciability.¹²

The rule precluding consideration of abstract or hypothetical questions is subject to exceptions,¹³ such as where an enactment may chill rights guaranteed by the First Amendment,¹⁴ although this exception is not applicable where professional advertising or other commercial speech is involved.¹⁵ Similarly, a challenge to the constitutionality of a public school district's policy of permitting student-led invocations is not premature, even though no message had actually been delivered, where the policy was invalid on its face as violating the First Amendment.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Ripeness, for judicial consideration of the effect of a restriction of the President's executive power to remove an official who assists him in carrying out his duties, is not delayed until the restriction is actually used, because when such a restriction violates constitutional separation of powers, it inflicts a here-and-now injury on affected third parties that can be remedied by a court. [U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 \(2020\).](#)

Pre-enforcement action brought by pro-life advocates challenging New Hampshire statute that permitted reproductive health care facilities to demarcate buffer zone extending up to 25 feet onto public property adjacent to any of the facility's private entrances, exits, or driveways, and prohibited members of the public from entering that zone, as violative of their First Amendment free expression rights, was not ripe for adjudication; any establishment of such buffer zone by any facility was purely speculative, and the possible contours of such future zone were highly uncertain. [U.S. Const. Amend. 1; N.H. Rev. Stat. Ann. §§ 132:37, 132:38, 132:40. Reddy v. Foster, 845 F.3d 493 \(1st Cir. 2017\).](#)

Action by student and her parent alleging that school district's weekly in-school Bible lessons violated Establishment Clause was ripe for adjudication, even though district temporarily suspended program after suit was filed, where student and her parent challenged program as it existed at time suit was filed. [U.S. Const. Amend. 1. Deal v. Mercer County Board of Education, 911 F.3d 183 \(4th Cir. 2018\).](#)

Religious employer's claim that California Department of Managed Health Care's (DMHC) requirement that group health insurance plans provide coverage for all legal abortions violated Free Exercise Clause was prudentially ripe for decision, even though DMHC retained discretion to create exemptions from coverage requirement, and no insurer had applied for exemption sought by employer, where, after DMHC formalized coverage requirement, insurer promptly amended employer's plan to include coverage that did not comport with its beliefs, state appellate court upheld DMHC's interpretation of state law, there was no established procedure for employer to persuade insurer to apply for exemption, and enforcement of requirement had already caused injury. [U.S. Const. Amend. 1. Skyline Wesleyan Church v. California Department of Managed Health Care, 959 F.3d 341 \(9th Cir. 2020\).](#)

Real estate industry advocacy organization stated a facial challenge to constitutionality of city law that limited conversion of hotels to condominiums, and thus, organization's constitutional claims for due process, equal protection, and takings violations were ripe for review; organization alleged that approximately 29 of its members owned hotels within the ambit of the challenged law and that the law had an immediate negative effect on the value of the affected hotel properties in alleged violation of these owners' constitutional rights. [U.S. Const. Amend. 5, 14. Real Estate Board of New York, Inc. v. City of New York, 165 A.D.3d 1, 84 N.Y.S.3d 33 \(1st Dep't 2018\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 La.—[Ring v. State, Dept. of Transp. and Development](#), 835 So. 2d 423 (La. 2003).
- 2 N.C.—[Augur v. Augur](#), 356 N.C. 582, 573 S.E.2d 125 (2002).
- 3 U.S.—[Doe v. Gillman](#), 479 F.2d 646 (8th Cir. 1973).
- Ill.—[W. F. Hall Printing Co. v. Environmental Protection Agency](#), 16 Ill. App. 3d 864, 306 N.E.2d 595 (1st Dist. 1973).
- N.Y.—[Bevan v. New York State Teachers' Retirement System](#), 44 A.D.2d 163, 355 N.Y.S.2d 185 (3d Dep't 1974).
- Tex.—[Jere Dairy, Inc. v. City of Mt. Pleasant](#), 417 S.W.2d 872 (Tex. Civ. App. Texarkana 1967), writ refused n.r.e., (Oct. 18, 1967).
- 4 U.S.—[Edward J. DeBartolo Corp. v. N.L.R.B.](#), 463 U.S. 147, 103 S. Ct. 2926, 77 L. Ed. 2d 535 (1983); [California Bankers Ass'n v. Shultz](#), 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974).
- Fla.—[Ivory v. Wainwright](#), 393 So. 2d 542 (Fla. 1980).
- Idaho—[Osmunson v. State](#), 135 Idaho 292, 17 P.3d 236, 150 Ed. Law Rep. 950 (2000).
- Ind.—[Indiana Dept. of Environmental Management v. Chemical Waste Management, Inc.](#), 643 N.E.2d 331 (Ind. 1994).
- Mass.—[School Committee of Boston v. Board of Ed.](#), 352 Mass. 693, 227 N.E.2d 729 (1967).
- Mich.—[Straus v. Governor](#), 459 Mich. 526, 592 N.W.2d 53 (1999).
- N.J.—[Application of Martin](#), 90 N.J. 295, 447 A.2d 1290 (1982).
- N.D.—[Ritter, Laber and Associates, Inc. v. Koch Oil, Inc., a Div. of Koch Industries, Inc.](#), 2001 ND 56, 623 N.W.2d 424 (N.D. 2001).
- S.D.—[Meinders v. Weber](#), 2000 SD 2, 604 N.W.2d 248 (S.D. 2000).
- Tex.—[Ex parte Spring](#), 586 S.W.2d 482 (Tex. Crim. App. 1978).
- Wash.—[Postema v. Pollution Control Hearings Bd.](#), 142 Wash. 2d 68, 11 P.3d 726 (2000).
- Wyo.—[Brenning v. State](#), 870 P.2d 349 (Wyo. 1994).

Case or controversy requirement

A litigant raising only a generally available grievance about the government, claiming only harm to his or her and every citizen's interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him or her than it does the public at large, does not state an Article III case or controversy.

U.S.—[Hollingsworth v. Perry](#), 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013).

Advertising by doctor

A chiropractor's First Amendment claim that the advertising provisions of a medical practice act were unconstitutionally vague was premature since a hearing by the medical disciplinary board was required.

Ill.—[Vuagniaux v. Department of Professional Regulation](#), 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).

Drug testing

A complaint brought by parents of public school students, alleging that a school district's drug testing policy violated the parents' privacy rights by the disclosure of positive test results to school officials, and the parents' right to make decisions involving their children's health care by mandating counseling after a positive drug test, was not ripe where the plaintiffs' children had tested negative.

Pa.—[Theodore v. Delaware Valley School Dist.](#), 575 Pa. 321, 836 A.2d 76, 183 Ed. Law Rep. 174 (2003).

Application for modification of mining permit

A due process challenge to a mining act was not ripe for determination where a permit holder had not applied for a modification, nor was there any indication it ever would, and the permit had been amended to provide that neighboring residents would receive notice of any application for a modification.

S.C.—[Waters v. South Carolina Land Resources Conservation Com'n](#), 321 S.C. 219, 467 S.E.2d 913 (1996).

- 5 U.S.—[Clinton v. Jones](#), 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997); [Young v. American Mini Theatres, Inc.](#), 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976); [Broadrick v. Oklahoma](#), 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).
Ala.—[Kirby v. City of Anniston](#), 720 So. 2d 887 (Ala. 1998).
Colo.—[People v. Harper](#), 193 Colo. 116, 562 P.2d 1112 (1977).
Conn.—[Barton v. Ducci Elec. Contractors, Inc.](#), 248 Conn. 793, 730 A.2d 1149 (1999).
Del.—[American Paving Co. v. Director of Revenue](#), 377 A.2d 379 (Del. Super. Ct. 1977).
Ga.—[St. John's Melkite Catholic Church v. Commissioner of Revenue](#), 240 Ga. 733, 242 S.E.2d 108 (1978).
Haw.—[State v. Marley](#), 54 Haw. 450, 509 P.2d 1095 (1973).
Idaho—[Idaho Ass'n of Public Dental Technicians, Inc. v. Idaho Bd. of Dental Examiners](#), 97 Idaho 631, 550 P.2d 134 (1976).
Ill.—[People v. Vandiver](#), 51 Ill. 2d 525, 283 N.E.2d 681 (1971).
Ind.—[Citizens Nat. Bank of Evansville v. Foster](#), 668 N.E.2d 1236 (Ind. 1996).
Ky.—[Northern Kentucky Area Planning Commission v. Hensley](#), 468 S.W.2d 293 (Ky. 1971).
La.—[Collins v. Rozands](#), 385 So. 2d 332 (La. Ct. App. 1st Cir. 1980).
Me.—[Matheson v. Bangor Pub. Co.](#), 414 A.2d 1203 (Me. 1980).
Md.—[Salisbury Beauty Schools v. State Bd. of Cosmetologists](#), 268 Md. 32, 300 A.2d 367 (1973).
Mass.—[Konstantopoulos v. Town of Whately](#), 384 Mass. 123, 424 N.E.2d 210 (1981).
Mich.—[Regents of University of Michigan v. State](#), 395 Mich. 52, 235 N.W.2d 1 (1975).
Minn.—[Striebel v. Minnesota State High School League](#), 321 N.W.2d 400, 5 Ed. Law Rep. 245 (Minn. 1982).
Miss.—[Miller's Estate v. Miller](#), 409 So. 2d 715 (Miss. 1982).
Mo.—[Manchester Fire Protection Dist. v. St. Louis County Bd. of Election Com'rs](#), 555 S.W.2d 297 (Mo. 1977).
Nev.—[Carlisle v. State](#), 98 Nev. 128, 642 P.2d 596 (1982).
N.J.—[State v. Saunders](#), 75 N.J. 200, 381 A.2d 333 (1977).
N.M.—[State v. Hines](#), 1967-NMSC-237, 78 N.M. 471, 432 P.2d 827 (1967).
N.C.—[Matter of Moore](#), 306 N.C. 394, 293 S.E.2d 127 (1982).
Ohio—[Dupler v. Mansfield Journal Co., Inc.](#), 64 Ohio St. 2d 116, 18 Ohio Op. 3d 354, 413 N.E.2d 1187 (1980).
Okla.—[Kimery v. Public Service Co. of Oklahoma](#), 1980 OK 187, 622 P.2d 1066 (Okla. 1980).
Pa.—[Com. v. Bonadio](#), 490 Pa. 91, 415 A.2d 47 (1980).
S.C.—[Horry County v. Cooke](#), 275 S.C. 19, 267 S.E.2d 82 (1980).
Tenn.—[Skiles v. State](#), 516 S.W.2d 75 (Tenn. 1974).
Tex.—[Mouton v. State](#), 627 S.W.2d 765 (Tex. App. Houston 1st Dist. 1981).
Va.—[Gayton Triangle Land Co. v. Board of Supervisors of Henrico County](#), 216 Va. 764, 222 S.E.2d 570 (1976).
Wash.—[Rupert v. Department of Social and Health Services](#), 89 Wash. 2d 698, 574 P.2d 1187 (1978).
W. Va.—[Quackenbush v. Quackenbush](#), 159 W. Va. 351, 222 S.E.2d 20 (1976).
Wis.—[Laufenberg v. Cosmetology Examining Bd. of Wisconsin Dept. of Regulation and Licensing](#), 87 Wis. 2d 175, 274 N.W.2d 618 (1979).
Wyo.—[Knudson v. Hilzer](#), 551 P.2d 680 (Wyo. 1976).
6 Conn.—[Hall v. Gilbert and Bennett Mfg. Co., Inc.](#), 241 Conn. 282, 695 A.2d 1051 (1997).
Ga.—[St. John's Melkite Catholic Church v. Commissioner of Revenue](#), 240 Ga. 733, 242 S.E.2d 108 (1978).
Md.—[Villa Nova Night Club, Inc. v. Comptroller of Treasury](#), 256 Md. 381, 260 A.2d 307 (1970).
N.D.—[Municipal Services Corp. v. Kusler](#), 490 N.W.2d 700 (N.D. 1992).
Ohio—[Fortner v. Thomas](#), 22 Ohio St. 2d 13, 51 Ohio Op. 2d 35, 257 N.E.2d 371 (1970).
Utah—[Hoyle v. Monson](#), 606 P.2d 240 (Utah 1980).
Mo.—[State v. Self](#), 155 S.W.3d 756, 195 Ed. Law Rep. 1019 (Mo. 2005).
7 U.S.—[Greer v. Spock](#), 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976); [U.S. v. Harriss](#), 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954); [U.S. v. Lindsay](#), 346 U.S. 568, 74 S. Ct. 287, 98 L. Ed. 300 (1954).
Ariz.—[Town of Chino Valley v. State Land Dept.](#), 119 Ariz. 243, 580 P.2d 704 (1978).
Ark.—[Cox v. Stayton](#), 273 Ark. 298, 619 S.W.2d 617 (1981).

Colo.—[Enger v. Walker Field, Colorado Public Airport Authority](#), 181 Colo. 253, 508 P.2d 1245 (1973).

Conn.—[Weil v. Miller](#), 185 Conn. 495, 441 A.2d 142 (1981).

Ga.—[Bradfield v. Hospital Authority of Muscogee County](#), 226 Ga. 575, 176 S.E.2d 92 (1970).

Haw.—[State v. Bumanglag](#), 63 Haw. 596, 634 P.2d 80 (1981).

Neb.—[State v. Irwin](#), 208 Neb. 123, 302 N.W.2d 386 (1981).

Tex.—[Ex parte Spring](#), 586 S.W.2d 482 (Tex. Crim. App. 1978).

Due process was afforded

Although there was plainly a substantial question whether a state statutory scheme afforded constitutionally required procedural due process, the question was not addressed where the appellant was in fact afforded due process in the trial court.

U.S.—[Jennings v. Mahoney](#), 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971).

9 U.S.—[W. E. B. DuBois Clubs of America v. Clark](#), 389 U.S. 309, 88 S. Ct. 450, 19 L. Ed. 2d 546 (1967).

Ariz.—[Moore v. Bolin](#), 70 Ariz. 354, 220 P.2d 850 (1950).

Cal.—[Tillie Lewis Foods, Inc. v. City of Pittsburg](#), 52 Cal. App. 3d 983, 124 Cal. Rptr. 698 (1st Dist. 1975).

D.C.—[Cobb v. Bynum](#), 387 A.2d 1095 (D.C. 1978).

Pa.—[Com. v. Cherney](#), 454 Pa. 285, 312 A.2d 38 (1973).

10 N.M.—[Mills v. New Mexico State Bd. of Psychologist Examiners](#), 1997-NMSC-028, 123 N.M. 421, 941 P.2d 502 (1997).

Issuance of license prohibited

An action challenging the constitutionality of statutes prohibiting the issuance of a license for riverboat gambling in two parishes without the approval of a majority of the electors in a referendum was not premature, despite the fact that the plaintiff had not been denied a license, since the statute unambiguously prohibited the issuance of a license unless the applicant received voter approval.

La.—[Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n](#), 646 So. 2d 885 (La. 1994).

11 **Veto**

A challenge to the constitutionality of an airport authority review board's veto power was ripe for adjudication, even if the veto power had not been exercised to the plaintiffs' detriment, where the threat of a veto was sufficient to raise constitutional questions.

U.S.—[Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.](#), 501 U.S. 252, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991).

12 U.S.—[Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.](#), 727 F.3d 1349 (11th Cir. 2013).

13 U.S.—[U.S. v. Appalachian Elec. Power Co.](#), 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); [Carter v. Carter Coal Co.](#), 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

Cal.—[Central Valley Chap. 7th Step Foundation v. Younger](#), 95 Cal. App. 3d 212, 157 Cal. Rptr. 117 (1st Dist. 1979).

14 U.S.—[International Soc. for Krishna Consciousness of Atlanta v. Eaves](#), 601 F.2d 809 (5th Cir. 1979).

Cal.—[People v. Fogelson](#), 21 Cal. 3d 158, 145 Cal. Rptr. 542, 577 P.2d 677 (1978).

Del.—[American Paving Co. v. Director of Revenue](#), 377 A.2d 379 (Del. Super. Ct. 1977).

Haw.—[State v. Manzo](#), 58 Haw. 440, 573 P.2d 945 (1977).

Ripeness

(1) Although federal courts apply the requirements of ripeness less stringently in the First Amendment context, a plaintiff must nevertheless establish that he or she possesses an actual and well-founded fear that the allegedly unconstitutional law will be enforced against him or her.

U.S.—[Wolfson v. Brammer](#), 616 F.3d 1045 (9th Cir. 2010).

(2) Advocacy organizations' free speech challenge to a state statute making it a crime to make a false statement about a proposed ballot initiative was ripe for adjudication inasmuch as their alleged injury was not based on speculation about a particular future prosecution or defeat of a particular ballot question but was speech that had already been chilled and speech that would be chilled each time a school funding initiative was on the ballot.

U.S.—[281 Care Committee v. Arneson](#), 638 F.3d 621 (8th Cir. 2011).

Unbridled discretion

A theater owner's challenge to an ordinance governing applications for adult use permits was not premature, even though the challenged portion had not been implemented, as the mere existence of unbridled discretion

conferred upon the director of licenses and permits to require other information rendered that provision of the ordinance constitutionally offensive.

N.Y.—[Doe v. City of Buffalo](#), 56 N.Y.2d 926, 453 N.Y.S.2d 605, 439 N.E.2d 321 (1982).

15 U.S.—[Allston v. Lewis](#), 480 F. Supp. 328 (D.S.C. 1979), aff'd, 688 F.2d 829 (4th Cir. 1982); [Briggs & Stratton Corp. v. Baldridge](#), 544 F. Supp. 667 (E.D. Wis. 1982).

16 U.S.—[Santa Fe Independent School Dist. v. Doe](#), 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).

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16 C.J.S. Constitutional Law § 219

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

2. Necessity of Determination

b. Premature or Abstract Questions

§ 219. Enactment and enforcement of statute

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  978 to 982

Ordinarily, a court will not determine the constitutionality of a statute before it is enacted and enforced unless it is too broad.

The constitutionality of a statute will not generally be considered before its enactment or effective date,¹ it is applied or enforced² in an unconstitutional manner,³ or it is rendered effective by additional legislation.⁴ To prevail on a facial challenge to legislation before any enforcement has been initiated, the challenger must show that the challenged law can never be applied in a valid manner or that the law was so broad that even if it could be applied in a valid manner, enforcement may inhibit constitutionally protected speech.⁵ Of course, the attempted enforcement of a statute makes a controversy over its constitutionality ripe.⁶

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Footnotes

- 1 U.S.—[Helvering v. Griffiths](#), 318 U.S. 371, 63 S. Ct. 636, 87 L. Ed. 843 (1943).
Ala.—[McDowell v. Columbia Pictures Corp.](#), 281 Ala. 438, 203 So. 2d 454 (1967).
Alaska—[Whitson v. Anchorage](#), 608 P.2d 759 (Alaska 1980).
Ariz.—[Citizens for Orderly Development and Environment v. City of Phoenix](#), 112 Ariz. 258, 540 P.2d 1239 (1975).
Colo.—[Billings v. Buchanan](#), 192 Colo. 32, 555 P.2d 176 (1976).
Ga.—[Widemon v. Burson](#), 224 Ga. 665, 164 S.E.2d 128 (1968).
Md.—[Villa Nova Night Club, Inc. v. Comptroller of Treasury](#), 256 Md. 381, 260 A.2d 307 (1970).
Mo.—[State ex rel. Voss v. Davis](#), 418 S.W.2d 163 (Mo. 1967).
Ohio—[State ex rel. Ohio Academy of Trial Lawyers v. Sheward](#), 86 Ohio St. 3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (1999).
- 2 U.S.—[California Bankers Ass'n v. Shultz](#), 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974).
Conn.—[Hall v. Gilbert and Bennett Mfg. Co., Inc.](#), 241 Conn. 282, 695 A.2d 1051 (1997).
Ohio—[State ex rel. Ohio Academy of Trial Lawyers v. Sheward](#), 86 Ohio St. 3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (1999).
Tex.—[In re Johnson](#), 554 S.W.2d 775 (Tex. Civ. App. Corpus Christi 1977), writ refused n.r.e., 569 S.W.2d 882 (Tex. 1978).
- 3 U.S.—[Harrison v. State of Mich.](#), 350 F. Supp. 846 (E.D. Mich. 1972).
- 4 Fla.—[Sarasota County v. Barg](#), 302 So. 2d 737 (Fla. 1974).
- 5 U.S.—[New York State Club Ass'n, Inc. v. City of New York](#), 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).
- 6 Mo.—[Ports Petroleum Co., Inc. of Ohio v. Nixon](#), 37 S.W.3d 237 (Mo. 2001).

16 C.J.S. Constitutional Law § 220

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

2. Necessity of Determination

b. Premature or Abstract Questions

§ 220. Initiative or referendum

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 978 to 982

Ordinarily, the validity of an initiative or referendum measure will not be determined prior to its submission to the electorate unless necessary to prevent unconstitutional abuse of the initiative process.

In accordance with the general rule that the constitutionality of a legislative provision will not be determined before its enactment,¹ a court usually will not, prior to its submission to the electorate, determine the constitutionality of an initiative² or referendum³ measure, such as a proposed amendment to a state constitution⁴ or to a city charter.⁵ Review before the election will not be allowed where the alleged constitutional infirmities were neither clear nor manifest, and reaching the merits of the challenges would not prevent the holding of an unnecessary election,⁶ and a court has jurisdiction after the election to hear challenges based on the alleged failure of the proposition to conform to constitutional requirements.⁷ Conversely, review may be allowed where the challengers have demonstrated a strong likelihood that the initiative violates a constitutional single subject rule, and thus the election process would be compromised,⁸ or that a proposed law is beyond the scope of the initiative power.⁹ Preelection review of an initiative petition may also be appropriate to prevent an election to enact an unconstitutional law.¹⁰

or a law that contains a substantive constitutional defect, such as a failure to allocate the duties of a constitutional office to be abolished by the proposal.¹¹ In some states, the scope of preelection review may be limited to such matters as whether the submission is misleading, and a challenge based on the argument that an initiative, as interpreted, may violate a constitutional provision is premature.¹²

CUMULATIVE SUPPLEMENT

Cases:

Claims asserted by prospective mayoral candidate, who had been a city alderman and state legislator, that city council's placement of proposed ballot referenda on ballot, which would have the effect of limiting his retirement benefits and imposing mayoral term limits based on his prior service as city alderman, violated his equal protection rights as a class-of-one, and violated his First Amendment political association rights, were not ripe for adjudication; the proposed referenda was were nothing more than proposed legislation until enacted by the public. *U.S. Const. Amend. 1, 14. Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053 (7th Cir. 2016).

[END OF SUPPLEMENT]

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Footnotes

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Colo.—[Matter of Title, Ballot Title and Submission Clause, and Summary Adopted May 21, 1997, by the Title Board Pertaining to Proposed Initiative 1997-98 No. 10, 943 P.2d 897 \(Colo. 1997\)](#).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

2. Necessity of Determination

b. Premature or Abstract Questions

§ 221. Criminal matters

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 978 to 982

As a general rule, the constitutionality of a statute involving criminal matters will not be determined in advance of its violation or a conviction.

In accordance with the general rules governing the necessity of determining constitutional questions,¹ in criminal matters, a court will not ordinarily determine the constitutionality of a statute that is not shown to have been violated² as when an accused has neither been charged with³ nor convicted of⁴ a violation of the statute. A determination whether a term in a criminal law is unconstitutionally vague on its face is premature when it was not first decided whether the definition was vague as applied to the defendant.⁵ However, under some circumstances, the constitutionality of a statute is ripe for adjudication where the accused has been charged with its violation although he or she has not yet been convicted.⁶ A person need not expose oneself to actual arrest or prosecution to challenge a statute that deters the exercise of First Amendment free speech rights.⁷

The constitutionality of penalties⁸ or treatment as a youthful⁹ or sexually violent¹⁰ offender will not ordinarily be determined before these sanctions are imposed. A challenge to the constitutionality of sentencing provisions is premature in advance of sentencing¹¹ as is a challenge to the constitutionality of the manner of review of sentences, in advance of any application for that review.¹²

The constitutionality of a statute under which an accused has been charged may be decided upon a reversal of a criminal conviction where a remand for a new trial is necessary, and a resolution of the constitutional issue will affect the ultimate outcome of the case¹³ or make a retrial unnecessary,¹⁴ or where further prosecution under the statute is foreseeable.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Prisoner's due process challenges to Alabama Sex Offender Registration and Community Notification Act's (SORCNA) post-release restrictions, such as the travel restriction, were not ripe, since there was no indication that prisoner was set to be released at any point in the foreseeable future, as he was sentenced to two life sentences and an additional ten years. [U.S. Const. Amend. 14; Ala. Code §§ 15-20A-1 et seq. Waldman v. Conway, 871 F.3d 1283 \(11th Cir. 2017\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 § 212.

2 Cal.—[People v. Noble, 68 Cal. App. 2d 853, 158 P.2d 225 \(3d Dist. 1945\).](#)

Neb.—[Dickens v. State, 139 Neb. 163, 296 N.W. 869 \(1941\).](#)

Tenn.—[State v. King, 635 S.W.2d 113 \(Tenn. 1982\).](#)

Wis.—[State v. 20th Century Market, 236 Wis. 215, 294 N.W. 873 \(1940\).](#)

3 U.S.—[Board of Trade of City of Chicago v. Olsen, 262 U.S. 1, 43 S. Ct. 470, 67 L. Ed. 839 \(1923\).](#)

Cal.—[People v. Duncan, 40 Cal. App. 3d 940, 115 Cal. Rptr. 699 \(1st Dist. 1974\).](#)

Me.—[State v. Scott, 317 A.2d 3 \(Me. 1974\).](#)

Md.—[Wethington v. State, 7 Md. App. 79, 253 A.2d 523 \(1969\).](#)

Wash.—[Wedem v. San Juan County, 135 Wash. 2d 678, 958 P.2d 273 \(1998\).](#)

4

U.S.—[Bryson v. U.S., 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 \(1969\).](#)

Cal.—[Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 \(1995\).](#)

Md.—[State v. Lawless, 13 Md. App. 220, 283 A.2d 160 \(1971\).](#)

Mich.—[People v. Jack, 61 Mich. App. 638, 233 N.W.2d 120 \(1975\).](#)

Mo.—[State v. Hasler, 449 S.W.2d 881 \(Mo. Ct. App. 1969\).](#)

Insufficient evidence

La.—[State in Interest of Lewis, 386 So. 2d 1079 \(La. Ct. App. 3d Cir. 1980\).](#)

Reversal of conviction

Colo.—[People v. Marquez, 190 Colo. 255, 546 P.2d 482 \(1976\).](#)

Fla.—[Gonzales v. City of Belle Glade, 287 So. 2d 669 \(Fla. 1973\).](#)

5

Ill.—[People v. Greco, 204 Ill. 2d 400, 274 Ill. Dec. 73, 790 N.E.2d 846 \(2003\).](#)

6

Cal.—[Bosco v. Justice Court, 77 Cal. App. 3d 179, 143 Cal. Rptr. 468 \(5th Dist. 1978\).](#)

7

Fla.—[State v. Newman, 405 So. 2d 971 \(Fla. 1981\).](#)

Wash.—[State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee, 135 Wash. 2d 618, 957 P.2d 691 \(1998\).](#)

- 8 U.S.—[U.S. v. Quinones](#), 313 F.3d 49 (2d Cir. 2002).
D.C.—[U. S. v. Thorne](#), 325 A.2d 764 (D.C. 1974).
Miss.—[Tarrants v. State](#), 236 So. 2d 360 (Miss. 1970).
Pa.—[Com. v. Lang](#), 285 Pa. Super. 34, 426 A.2d 691 (1981).
Tenn.—[State v. Hailey](#), 505 S.W.2d 712 (Tenn. 1974).
Wash.—[In re Boot](#), 130 Wash. 2d 553, 925 P.2d 964 (1996).

Fine or incarceration

Me.—[State v. Dow](#), 392 A.2d 532 (Me. 1978).

Mandatory alcoholism assessment

A constitutional challenge to a statute empowering a court to order first-time offenders convicted of driving under the influence to follow the recommendations of a mandatory alcohol assessment was not ripe for adjudication where the defendant had not yet been assessed for alcohol abuse nor ordered to follow any recommendation.

Neb.—[State v. Hansen](#), 259 Neb. 764, 612 N.W.2d 477 (2000).

9 Mich.—[People v. Bandy](#), 35 Mich. App. 53, 192 N.W.2d 115 (1971).

10 Wash.—[Matter of Detention of McClatchey](#), 133 Wash. 2d 1, 940 P.2d 646 (1997).

11 Cal.—[People v. Romo](#), 14 Cal. 3d 189, 121 Cal. Rptr. 111, 534 P.2d 1015 (1975).

12 Ill.—[People v. Haron](#), 85 Ill. 2d 261, 52 Ill. Dec. 625, 422 N.E.2d 627 (1981).

13 Ga.—[Smith v. State](#), 160 Ga. App. 26, 285 S.E.2d 749 (1981).

14 Ill.—[People v. Vandiver](#), 51 Ill. 2d 525, 283 N.E.2d 681 (1971).

15 N.Y.—[People v. Dominick](#), 68 Misc. 2d 425, 326 N.Y.S.2d 466 (County Ct. 1971).

Fla.—[State v. Dye](#), 346 So. 2d 538 (Fla. 1977).

Abortion

Under a state's ban on partial-birth abortions, a physician faced a significant risk of criminal prosecution and license revocation, and thus, his challenge to the constitutionality of the ban was ripe.

U.S.—[Carhart v. Stenberg](#), 972 F. Supp. 507 (D. Neb. 1997).

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Constitutional Law

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2. Necessity of Determination

c. Moot Cases or Questions

§ 222. Determination of constitutional questions in moot cases

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  977

Ordinarily, a constitutional question will not be determined in a controversy that has become moot.

Subject to certain exceptions,¹ a constitutional question will not be decided where, due to a change of circumstances, the controversy in which it was raised has become moot.² This rule has been followed where the challenged regulations or procedures have been discontinued,³ or a disposition would come too late to affect a particular litigant.⁴ For instance, the graduation of high school students renders moot constitutional challenges to school rules.⁵ The attainment of the prescribed age renders moot constitutional challenges to laws restricting minors from buying beer,⁶ or requiring compulsory attendance in school until reaching a certain age,⁷ although there is also authority that a challenge to laws prohibiting persons under age 21 from gambling was not moot where the plaintiff was 20 years old when instituting the litigation.⁸ In the absence of some exception to the mootness doctrine,⁹ claims about jail conditions are rendered moot when the prisoners are released.¹⁰ Moreover, a court will not consider the constitutionality of a statute, rule, or state constitutional provision that has been repealed,¹¹

amended,¹² or superseded,¹³ or has expired,¹⁴ in the absence of some collateral effect on a litigant.¹⁵ In addition, where a statute of limitations bars a particular cause of action, the constitutional issues sought to be raised are rendered moot.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

State's decision to end practice of placing indigent defendants on wait list for public defender mooted arrestees' claims against state public defender that their placement on wait list violated their Sixth Amendment right to counsel and Fourteenth Amendment right to equal protection; even if decision was made by state public defender, rather than state legislature, Court of Appeals could presume that public defender, as government entity, made decision in good faith, rather than for litigation posturing purposes, public defender had agreed that practice was unconstitutional but was necessitated by budgetary issues, and Court of Appeals could not presume that arrestees could be placed on wait list in future without assuming that arrestees would violate valid criminal laws in future. [U.S. Const. Amends. 6, 14. Yarls v. Bunton, 905 F.3d 905 \(5th Cir. 2018\)](#).

Action brought by county jail detainees who refused to participate in court-created program granting 30-day sentencing credit to detainees who underwent sterilization procedures, alleging that program violated their equal protection rights and seeking injunctive relief, was not rendered moot by detainees' release from jail; award of sentencing credit to released detainees could still provide relief, as the credit could impact collateral rights under state law, including their right to pursue expungement, that were dependent on the date their sentences were terminated. [U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14; Tenn. Code Ann. § 40-32-101\(g\)\(2\)\(B\). Sullivan v. Benningfield, 920 F.3d 401 \(6th Cir. 2019\)](#).

Claim against Government by pregnant unaccompanied alien minor, challenging policy effectively precluding minor's access to abortion while in custody of Office of Refugee Resettlement (ORR) as violating First Amendment, was moot, where minor had left ORR custody. [U.S. Const. Amend. 1. J.D. v. Azar, 925 F.3d 1291 \(D.C. Cir. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 §§ 223 et seq.
- 2 U.S.—[Sanks v. Georgia, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 \(1971\)](#).
Ariz.—[Moore v. Bolin, 70 Ariz. 354, 220 P.2d 850 \(1950\)](#).
Del.—[In re Brown, 402 A.2d 367 \(Del. 1979\)](#).
Fla.—[Richman v. Shevin, 354 So. 2d 1200 \(Fla. 1977\)](#).
Ga.—[Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 \(1980\)](#).
Idaho—[State ex rel. Idaho State Park Bd. v. City of Boise, By and Through Amyx, 95 Idaho 380, 509 P.2d 1301 \(1973\)](#).
Kan.—[Randall v. Seemann, 228 Kan. 395, 613 P.2d 1376 \(1980\)](#).
Me.—[Taylor v. Commissioner of Mental Health and Corrections, 431 A.2d 1304 \(Me. 1981\)](#).
Mich.—[People v. Kruper, 340 Mich. 114, 64 N.W.2d 629 \(1954\)](#).
Mo.—[Minnesota Mut. Life Ins. Co. v. Fuhrman, 521 S.W.2d 440 \(Mo. 1975\)](#).
Mont.—[State ex rel. Krutzfeldt v. District Court of Thirteenth Judicial Dist., In and For Yellowstone County, 163 Mont. 164, 515 P.2d 1312 \(1973\)](#).
N.H.—[Millard v. Perrin, 118 N.H. 565, 391 A.2d 886 \(1978\)](#).
N.J.—[Scott v. Town of Bloomfield, 52 N.J. 473, 246 A.2d 129 \(1968\)](#).
N.D.—[Ferch v. Housing Authority of Cass County, 79 N.D. 764, 59 N.W.2d 849 \(1953\)](#).

R.I.—[State v. DePasquale](#), 413 A.2d 101 (R.I. 1980).

Tenn.—[State ex rel. Nelson v. Sims](#), 583 S.W.2d 302 (Tenn. 1976) (overruled on other grounds by, [Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County](#), 301 S.W.3d 196 (Tenn. 2009)).

Wash.—[Matter of Disciplinary Proceeding Against Blauvelt](#), 115 Wash. 2d 735, 801 P.2d 235 (1990).

Appointment of appellate counsel

The issue whether a criminal defendant was denied due process when he was not appointed counsel on the State's appeal from a suppression order was moot where the defendant was represented by counsel before the state supreme court and could present his arguments in that forum.

Ill.—[People v. Anthony](#), 198 Ill. 2d 194, 260 Ill. Dec. 632, 761 N.E.2d 1188 (2001).

Constitutional claims not moot

(1) A class action suit brought on behalf of nonunion state employees alleging the union's imposition of midterm dues and a fee increase without *Hudson* notice of fair share fees violated their First Amendment rights was not rendered moot by the fact that, after the Supreme Court had granted certiorari in the case, the union sent out a notice offering a full refund to all class members since the union continued to defend the legality of the fee increase, and there was a live controversy as to the adequacy of the union's refund notice. U.S.—[Knox v. Service Employees Intern. Union, Local 1000](#), 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

(2) A facial challenge to the constitutionality of the "Millionaires' Amendment" of the Bipartisan Campaign Reform Act, relaxing limits on the ability of an opponent of a self-financed House of Representatives candidate to raise money from donors and coordinate campaign spending with party committees, brought by a self-financed House candidate was not rendered moot by the conclusion of the election where the Federal Election Commission conceded that the case would not be moot if the candidate planned to self-finance another bid for a House seat, and the candidate subsequently made a public statement expressing his intent to do so.

U.S.—[Davis v. Federal Election Com'n](#), 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

(3) A school district's alleged cessation of a student assignment plan that relied on racial classification, pending the outcome of litigation that challenged the plan under the Equal Protection Clause, did not render such litigation moot, or negate the plaintiff parents' standing, where the school district vigorously defended the constitutionality of its race-based program and nowhere suggested that if the litigation was resolved in its favor, it would not resume using race to assign students.

U.S.—[Parents Involved in Community Schools v. Seattle School Dist. No. 1](#), 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 220 Ed. Law Rep. 84 (2007).

3 Ill.—[Schrader v. Krok](#), 99 Ill. App. 3d 129, 54 Ill. Dec. 454, 424 N.E.2d 1357 (2d Dist. 1981).

N.J.—[Application of Martin](#), 90 N.J. 295, 447 A.2d 1290 (1982).

As to the effect of voluntary cessation, see § 225.

4 U.S.—[Cameron v. Whirlwindhorse](#), 494 F.2d 110 (8th Cir. 1974); [Kuahulu v. Employers Ins. of Wausau](#), 557 F.2d 1334, 24 Fed. R. Serv. 2d 1119 (9th Cir. 1977).

Ill.—[People v. Boucher](#), 75 Ill. App. 3d 322, 31 Ill. Dec. 144, 394 N.E.2d 60 (3d Dist. 1979).

La.—[Jones v. Natchitoches Parish Police Jury](#), 371 So. 2d 1243 (La. Ct. App. 3d Cir. 1979).

Pa.—[Cunningham v. Com., Pennsylvania Bd. of Probation and Parole](#), 39 Pa. Commw. 229, 394 A.2d 1315 (1978).

Tex.—[Southern Methodist University v. Smith](#), 515 S.W.2d 63 (Tex. Civ. App. Dallas 1974), writ refused n.r.e., (Nov. 27, 1974).

Revoked license restored

U.S.—[Valentino v. Howlett](#), 528 F.2d 975 (7th Cir. 1976).

Juvenile detention

A juvenile court's conclusion that a statute, which establishes a presumption that any juvenile alleged to have committed an enumerated offense is a danger to him- or herself, or to the community, thereby warranting further detention, was unconstitutional as applied to a juvenile was moot where that juvenile had been released from detention.

Colo.—[People v. Juvenile Court, City and County of Denver](#), 893 P.2d 81 (Colo. 1995).

5 U.S.—[Board of School Com'r's of City of Indianapolis v. Jacobs](#), 420 U.S. 128, 95 S. Ct. 848, 43 L. Ed. 2d 74, 19 Fed. R. Serv. 2d 934 (1975).

N.J.—[Oxford v. New Jersey State Bd. of Ed.](#), 68 N.J. 301, 344 A.2d 769 (1975).

6 U.S.—[Craig v. Boren](#), 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976).

- 7 S.C.—[Ex parte Lathan J. by Chappell](#), 288 S.C. 479, 343 S.E.2d 619, 32 Ed. Law Rep. 798 (1986).
8 La.—[Latour v. State](#), 778 So. 2d 557 (La. 2001).
9 §§ 223 et seq.
10 Tex.—[Williams v. Lara](#), 52 S.W.3d 171 (Tex. 2001).
11 U.S.—[Bryson v. U.S.](#), 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 (1969).
 Ga.—[Moore v. Martin](#), 232 Ga. 622, 208 S.E.2d 448 (1974).
 Md.—[Cities Service Co. v. Governor, State of Md.](#), 290 Md. 553, 431 A.2d 663 (1981).
 Mass.—[Com. v. Snow](#), 363 Mass. 778, 298 N.E.2d 804 (1973).
 Miss.—[Ladner v. Fisher](#), 269 So. 2d 633 (Miss. 1972).
 Mo.—[Williams v. Williams](#), 510 S.W.2d 452 (Mo. 1974).
 Neb.—[DeCoste v. City of Wahoo](#), 255 Neb. 266, 583 N.W.2d 595 (1998).
 N.H.—[State v. Schena](#), 110 N.H. 73, 260 A.2d 93 (1969).
 N.C.—[State v. McCluney](#), 280 N.C. 404, 185 S.E.2d 870 (1972).
 Ohio—[State ex rel. Roof v. Board of Com'rs of Hardin County](#), 39 Ohio St. 2d 130, 68 Ohio Op. 2d 85, 314 N.E.2d 172 (1974).
 Wash.—[State v. Hegge](#), 89 Wash. 2d 584, 574 P.2d 386 (1978).
12 U.S.—[Massachusetts v. Oakes](#), 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989).
 Ill.—[Richardson v. Rock Island County Officers Electoral Bd.](#), 179 Ill. 2d 252, 227 Ill. Dec. 940, 688 N.E.2d 633 (1997).
 Wash.—[Foisy v. Wyman](#), 83 Wash. 2d 22, 515 P.2d 160 (1973).
State constitutional provision on voting by criminal amended
Cal.—[Ramirez v. Brown](#), 12 Cal. 3d 912, 117 Cal. Rptr. 562, 528 P.2d 378 (1974).
Single subject rule
The doctrine that a constitutional challenge to legislation becomes moot if the legislation is amended did not apply to a claim that an act violated the single subject rule of a state constitution since the defect in enactment could not be remedied by a subsequent amendment deleting or altering a particular provision of the act, at least until the entire act is superseded.
Ill.—[Johnson v. Edgar](#), 176 Ill. 2d 499, 224 Ill. Dec. 1, 680 N.E.2d 1372 (1997).
13 Mich.—[Regents of University of Michigan v. State](#), 395 Mich. 52, 235 N.W.2d 1 (1975).
Regulation superseded by statute
Vt.—[Lague, Inc. v. State](#), 136 Vt. 413, 392 A.2d 942 (1978).
New rules adopted
Mo.—[State ex rel. Ken Reynolds Pharmacies v. Pyle](#), 564 S.W.2d 870 (Mo. 1978).
Tex.—[Texas Woman's University v. Chaykintaste](#), 530 S.W.2d 927 (Tex. 1975).
Subsequent departmental directive
Wis.—[State ex rel. Ellenburg v. Gagnon](#), 76 Wis. 2d 532, 251 N.W.2d 773 (1977).
14 **Expired amendment to gambling compact**
N.Y.—[Saratoga County Chamber of Commerce, Inc. v. Pataki](#), 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).
15 § 224.
16 Minn.—[Chizmadia v. Smiley's Point Clinic](#), 428 N.W.2d 459 (Minn. Ct. App. 1988).

16 C.J.S. Constitutional Law § 223

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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2. Necessity of Determination

c. Moot Cases or Questions

§ 223. Matters of public importance capable of repetition

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An exception to the mootness doctrine is recognized when a constitutional question is of public importance or is raised in a class action and is capable of repetition yet evades review.

A constitutional issue may be determined regardless of its mootness with respect to a particular litigant if it is one of public importance¹ or raised in a class action² and is capable of repetition³ yet evading review.⁴

Cases demonstrating extreme public importance, thus justifying review of an otherwise moot issue, usually involve matters that relate to important constitutional rights, a person's livelihood, or voting rights.⁵ The capable of repetition yet evading review exception has been applied to litigation involving abortion,⁶ First Amendment rights,⁷ the closing of a criminal trial,⁸ prisoners' rights,⁹ and school discipline.¹⁰ It has been frequently invoked with respect to elections,¹¹ particularly with respect to issues pertaining to independent candidates¹² or minor¹³ or new¹⁴ parties. On the other hand, the capable of repetition yet evading

review exception does not apply to an action by former jail inmates about their rights while incarcerated where it was speculative whether they would again be charged with a crime that could lead to time in jail.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Governor's announcement, that he had directed Missouri Department of Natural Resources to begin allowing religious organizations to receive Department grants on same terms as secular organizations, did not moot action, brought by church, which operated preschool and daycare center, alleging that State violated its free exercise rights in denying grant for purchase of rubber playground surfaces, which denial was based on Department's policy of denying grants to religiously affiliated applicants, since it was not absolutely clear that Department could not revert to its policy of excluding religious organizations. [U.S.C.A. Const. Amend. 1. Trinity Lutheran Church of Columbia, Inc. v. Comer, 2017 WL 2722410 \(U.S. 2017\)](#).

Federal Bureau of Prisons (BOP) met burden of establishing that voluntary cessation exception to mootness did not apply to prison magazine publisher's claim that BOP's wholesale rejection, rather than redaction, of 11 magazines based on their content constituted improper censorship in violation of the First Amendment, which claim was otherwise rendered moot by BOP's revision of prison's publication-review policies and prison warden's declaration limiting facility's ability to reject substantially similar future publications, though revised administrative policies and declaration did not address claim regarding redaction; publisher's claims were as-applied, and given that BOP showed that it would not reject substantially similar future publications, it followed that future publications would not be rejected in their entirety. [U.S. Const. Amend. 1. Prison Legal News v. Federal Bureau of Prisons, 944 F.3d 868 \(10th Cir. 2019\)](#).

Void-for-vagueness challenges raised by organizations challenging IRS's processing of tax-exempt status applications pursuant to different standards and at different rates depending upon organizations' viewpoints were not rendered moot, where two organizations' applications still had not been processed after extensive litigation, and thus IRS's conduct continued to affect those two organizations. U.S. Const. art. 3, § 2; [U.S. Const. Amend. 1. True the Vote, Inc. v. Internal Revenue Service, 831 F.3d 551 \(D.C. Cir. 2016\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Alaska—[City of Valdez v. Valdez Development Co., 506 P.2d 1279 \(Alaska 1973\)](#).
Ark.—[McKinney v. McKinney, 305 Ark. 13, 805 S.W.2d 66 \(1991\)](#).
Cal.—[Eye Dog Foundation v. State Bd. of Guide Dogs for Blind, 67 Cal. 2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 \(1967\)](#).
Colo.—[Trinidad School Dist. No. 1 v. Lopez By and Through Lopez, 963 P.2d 1095, 129 Ed. Law Rep. 812 \(Colo. 1998\)](#).
Ga.—[Florida Pub. Co. v. Morgan, 253 Ga. 467, 322 S.E.2d 233 \(1984\)](#).
Mass.—[Champagne v. Commissioner of Correction, 395 Mass. 382, 480 N.E.2d 609 \(1985\)](#).
Oklahoma—[State ex rel. Oklahoma State Bureau of Investigation v. Warren, 1998 OK 133, 975 P.2d 900 \(Okla. 1998\)](#).
Wis.—[Reserve Life Ins. Co. v. La Follette, 108 Wis. 2d 637, 323 N.W.2d 173 \(Ct. App. 1982\)](#).

Annexation act

- Ga.—[Bruck v. City of Temple, 240 Ga. 411, 240 S.E.2d 876 \(1977\)](#).

Claims capable of repetition while evading review

U.S.—*Turner v. Rogers*, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011); *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007).

Exception not applicable

U.S.—*Milwaukee Police Ass'n v. Board of Fire & Police Com'rs of City of Milwaukee*, 708 F.3d 921 (7th Cir. 2013).

2 U.S.—*Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532, 19 Fed. R. Serv. 2d 925 (1975).

Ind.—*Matter of Tina T.*, 579 N.E.2d 48 (Ind. 1991).

3 U.S.—*First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

Colo.—*Bestway Disposal v. Public Utilities Commission*, 184 Colo. 428, 520 P.2d 1039 (1974).

Idaho—*V-1 Oil Co. v. State Tax Com'n*, 112 Idaho 508, 733 P.2d 729 (1987).

Iowa—*Catholic Charities of Archdiocese of Dubuque v. Zalesky*, 232 N.W.2d 539 (Iowa 1975).

La.—*Kirk v. State*, 526 So. 2d 223 (La. 1988).

Mass.—*Champagne v. Commissioner of Correction*, 395 Mass. 382, 480 N.E.2d 609 (1985).

N.Y.—*Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 347 N.Y.S.2d 170, 300 N.E.2d 710 (1973).

Okla.—*State ex rel. Oklahoma State Bureau of Investigation v. Warren*, 1998 OK 133, 975 P.2d 900 (Okla. 1998).

S.D.—*South Dakota Physician's Health Group v. State By and Through Dept. of Health*, 447 N.W.2d 511 (S.D. 1989).

Seizure of debtor's goods

Where, at the time an action was filed challenging the constitutionality of a "claim and delivery" statute, the plaintiff had been summarily deprived of her property in advance of a final judgment, the controversy was not rendered moot when a judgment was subsequently rendered vesting the creditor with the right to possession of the seized goods since, due to the plaintiff's poverty, she would again likely be subject to the challenged statutory procedure.

U.S.—*Hammond v. Powell*, 462 F.2d 1053, 16 Fed. R. Serv. 2d 214 (4th Cir. 1972).

4 U.S.—*First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

Alaska—*Etheredge v. Bradley*, 502 P.2d 146 (Alaska 1972).

Colo.—*Trinidad School Dist. No. 1 v. Lopez By and Through Lopez*, 963 P.2d 1095, 129 Ed. Law Rep. 812 (Colo. 1998).

Idaho—*V-1 Oil Co. v. State Tax Com'n*, 112 Idaho 508, 733 P.2d 729 (1987).

La.—*Kirk v. State*, 526 So. 2d 223 (La. 1988).

Mass.—*Champagne v. Commissioner of Correction*, 395 Mass. 382, 480 N.E.2d 609 (1985).

Minn.—*State ex rel. Doe v. Madonna*, 295 N.W.2d 356 (Minn. 1980).

Mo.—*Gramex Corp. v. Von Romer*, 603 S.W.2d 521 (Mo. 1980).

S.D.—*Sedlacek v. South Dakota Teener Baseball Program*, 437 N.W.2d 866 (S.D. 1989).

R.I.—*In re Christopher B.*, 823 A.2d 301, 12 A.L.R.6th 859 (R.I. 2003).

Override of veto

The "public interest" exception to the mootness doctrine applied to the issue whether a state constitution barred the governor's suit against the legislative council, in which the governor claimed that a legislative override vote was untimely and did not affect a veto.

Alaska—*Legislative Council v. Knowles*, 988 P.2d 604 (Alaska 1999).

6 U.S.—*Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).

Parade permits

Because temporary orders imposing prior restraints upon free speech are by nature short-lived, a city's denial of parade permits was capable of repetition, yet evading review, so as to maintain the viability of the controversy, notwithstanding that the date and conditions for which the permits were requested had passed.

Tex.—*Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202 (Tex. 1981).

8 U.S.—*Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

Religious freedom

A Catholic inmate's claims that a corrections facility violated his right to freedom of religion by failing to provide him with religious meals during Lent was not rendered moot by the inmate's transfer to a different

prison since it was possible that he could be returned to the facility; therefore, the alleged deprivation of a fundamental right was capable of repetition yet could evade review.

Mont.—[Cape v. Crossroads Correctional Center](#), 2004 MT 265, 323 Mont. 140, 99 P.3d 171 (2004).

10 Wyo.—[In re RM](#), 2004 WY 162, 102 P.3d 868, 194 Ed. Law Rep. 426 (Wyo. 2004).

11 Cal.—[Green v. Layton](#), 14 Cal. 3d 922, 123 Cal. Rptr. 97, 538 P.2d 225 (1975).

Fla.—[Sadowski v. Shevin](#), 345 So. 2d 330 (Fla. 1977).

Candidate's residency qualification

U.S.—[Henderson v. Fort Worth Independent School Dist.](#), 526 F.2d 286 (5th Cir. 1976).

Filing fee

U.S.—[Brown v. Chote](#), 411 U.S. 452, 93 S. Ct. 1732, 36 L. Ed. 2d 420 (1973).

Cal.—[Knoll v. Davidson](#), 12 Cal. 3d 335, 116 Cal. Rptr. 97, 525 P.2d 1273 (1974).

Nomination procedures

U.S.—[Montano v. Lefkowitz](#), 575 F.2d 378 (2d Cir. 1978).

Place on ballot

U.S.—[American Party of Texas v. White](#), 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974).

12 U.S.—[Mandel v. Bradley](#), 432 U.S. 173, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977); [Storer v. Brown](#), 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

13 U.S.—[Fishman v. Schaffer](#), 429 U.S. 1325, 97 S. Ct. 14, 50 L. Ed. 2d 56 (1976).

14 U.S.—[Norman v. Reed](#), 502 U.S. 279, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992).

Mich.—[Socialist Workers Party v. Secretary of State](#), 412 Mich. 571, 317 N.W.2d 1 (1982).

15 Tex.—[Williams v. Lara](#), 52 S.W.3d 171 (Tex. 2001).

16 C.J.S. Constitutional Law § 224

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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§ 224. Party retains interest in outcome

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West's Key Number Digest

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A case raising a constitutional issue is not moot if a party retains an interest in the outcome or would suffer collateral consequences if the matter is not resolved.

An action raising a constitutional question may not be considered moot where a party to it retains an interest in its outcome¹, or, as a result of the failure to consider the issue, would suffer collateral consequences,² such as those resulting from an adverse criminal,³ military,⁴ or school⁵ record. Collateral consequences may also occur when release from prison was conditioned upon compliance with terms that significantly restricted the complainant's freedom,⁶ or contempt may still be imposed as a sanction.⁷ A case raising a constitutional issue is not moot where there is a deprivation of property⁸ or benefits⁹ or where an affirmative recovery,¹⁰ such as pecuniary reimbursement, is sought.¹¹ Accordingly, a suit challenging the constitutionality of a statutory provision is not rendered moot by an intervening legislative,¹² judicial,¹³ or administrative¹⁴ action that does not remedy the grievance on the basis of which the suit was brought or leaves collateral consequences unresolved. On the other hand, the repeal

of a statute makes a court decision holding that statute unconstitutional moot where the repeal renders the administrative order being reviewed unenforceable.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Action brought by city residents against city, challenging city's approval of religious organization's proposal to construct building, with a museum, as violating the Establishment Clause of the First Amendment, and seeking injunctive and declaratory relief, was rendered moot when state court invalidated the planned construction, since the state court invalidated the project completely. [U.S. Const. Amend. 1. Gagliardi v. TJCV Land Trust, 889 F.3d 728 \(11th Cir. 2018\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Dilulio v. Board of Fire and Police Com'rs of City of Northlake, 682 F.2d 666 \(7th Cir. 1982\)](#) (overruled on other grounds by, [Bigby v. City of Chicago, 766 F.2d 1053 \(7th Cir. 1985\)](#)).

Reopening adult establishment

A suit by the operator of an establishment featuring nude erotic dancing, which challenged the constitutionality of a city's public indecency ordinance proscribing nudity in public places, was not rendered moot by the closing of the establishment where the operator was still incorporated and could attempt to again open such an establishment, and the city had an ongoing injury because it was barred from enforcing its ordinance.

U.S.—[City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 \(2000\)](#).

School curriculum

A complaint, alleging that school officials violated students' rights by removing certain books, eliminating certain courses, and failing to rehire certain teachers, was not rendered moot by the fact that subsequent to incidents alleged, the school board adopted a new curriculum where it was alleged that the actions had a chilling effect on academic freedom and have caused harm.

U.S.—[Zykan v. Warsaw Community School Corp., 631 F.2d 1300 \(7th Cir. 1980\)](#).

2 D.C.—[Medynski v. Margolis, 389 F. Supp. 743 \(D.D.C. 1975\)](#).

Minn.—[State ex rel. Doe v. Madonna, 295 N.W.2d 356 \(Minn. 1980\)](#).

Suspended license

The fact that drivers' license suspensions had ended before the individuals had filed complaints alleging that they had not been given notice of the existence of postsuspension administrative hearings when their licenses were confiscated did not render actions challenging the constitutionality of procedures followed when suspending the licenses moot since despite the expiration of the challenged order, there was the possibility of other adverse collateral legal consequences.

Minn.—[Elzie v. Commissioner of Public Safety, 298 N.W.2d 29 \(Minn. 1980\)](#).

3 U.S.—[Beavers v. Sielaff, 400 F. Supp. 595 \(N.D. Ill. 1975\)](#).

DNA database

An action in which a plaintiff raised constitutional challenges to a DNA database statute was not moot, even though the conviction that made the plaintiff subject to the statute's requirements had been reversed and a new trial was ordered, where the plaintiff was still required to wait one year or obtain written authorization of no further prosecution on the charge before he could move to expunge his DNA record.

Mass.—[Landry v. Attorney General, 429 Mass. 336, 709 N.E.2d 1085, 76 A.L.R.5th 703 \(1999\)](#).

4 U.S.—[Carlson v. Schlesinger, 511 F.2d 1327 \(D.C. Cir. 1975\)](#).

- 5 U.S.—[Lopez v. Williams](#), 372 F. Supp. 1279 (S.D. Ohio 1973), judgment aff'd, [419 U.S. 565](#), 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).
- 6 U.S.—[Jago v. Van Curen](#), 454 U.S. 14, 102 S. Ct. 31, 70 L. Ed. 2d 13 (1981).
- 7 U.S.—[Stamler v. Willis](#), 415 F.2d 1365 (7th Cir. 1969).
- Minn.—[Klaus v. Minnesota State Ethics Commission](#), 309 Minn. 430, 244 N.W.2d 672 (1976).
- 8 U.S.—[Connolly v. Pension Benefit Guaranty Corp.](#), 673 F.2d 1110 (9th Cir. 1982).
- Distrain**
- N.J.—[Van Ness Industries, Inc. v. Claremont Painting & Decorating Co.](#), 129 N.J. Super. 507, 324 A.2d 102 (Ch. Div. 1974).
- Garnishment**
- A defendant did not, by posting a bond to release a garnishment of his accounts receivable, render the issue of the validity of a garnishment statute moot since the economic burden sustained stemmed directly from the garnishment proceeding.
- Minn.—[Jones Press, Inc. v. Motor Travel Services, Inc.](#), 286 Minn. 205, 176 N.W.2d 87 (1970).
- 9 **Belated promotion**
- U.S.—[Rosser v. Newman](#), 528 F.2d 1025 (5th Cir. 1976).
- Disability benefits**
- U.S.—[Pedroza v. Secretary of Health, Ed. and Welfare](#), 382 F. Supp. 916 (D.P.R. 1974).
- Telephone service discontinued**
- Cal.—[Goldin v. Public Utilities Commission](#), 23 Cal. 3d 638, 153 Cal. Rptr. 802, 592 P.2d 289 (1979).
- 10 **Sell public housing**
- A claim that a municipality had not complied with a state constitutional requirement of voter approval for a low-income housing project was not rendered moot by the construction of the project during the pendency of the litigation since, if the constitution were violated, a variety of remedies might be available, including an order requiring that the municipality sell the units or discontinue their use for low-income housing purposes.
- Cal.—[Davis v. City of Berkeley](#), 51 Cal. 3d 227, 272 Cal. Rptr. 139, 794 P.2d 897 (1990).
- 11 **Damages under civil rights laws**
- The facts that inmates were released from county jail and were not entitled to prospective relief did not render moot their claim under [42 U.S.C.A. § 1983](#) for damages based on their contention that a religious education program at the jail was unconstitutional.
- Tex.—[Williams v. Lara](#), 52 S.W.3d 171 (Tex. 2001).
- Reinstatement and back wages**
- U.S.—[Haining v. Roberts](#), 320 F. Supp. 1054 (S.D. Miss. 1970).
- Tax refund**
- La.—[Cat's Meow, Inc. v. City of New Orleans Through Dept. of Finance](#), 720 So. 2d 1186 (La. 1998).
- Neb.—[Jaksha v. State](#), 241 Neb. 106, 486 N.W.2d 858 (1992).
- Refund of truck decal fee**
- R.I.—[Seibert v. Clark](#), 619 A.2d 1108 (R.I. 1993).
- Recovery of assessment for transit**
- Colo.—[Anema v. Transit Const. Authority](#), 788 P.2d 1261 (Colo. 1990).
- 12 U.S.—[American Party of Texas v. White](#), 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1974).
- Cal.—[Longshore v. County of Ventura](#), 25 Cal. 3d 14, 157 Cal. Rptr. 706, 598 P.2d 866 (1979).
- La.—[Cat's Meow, Inc. v. City of New Orleans Through Dept. of Finance](#), 720 So. 2d 1186 (La. 1998).
- N.J.—[Alfred Vail Mut. Ass'n v. Halpin](#), 107 N.J. Super. 517, 259 A.2d 477 (App. Div. 1969), judgment aff'd, 58 N.J. 40, 274 A.2d 801 (1971).
- Wash.—[Marino Property Co. v. Port Com'rs of Port of Seattle](#), 97 Wash. 2d 307, 644 P.2d 1181 (1982).
- Repeal of criminal statute**
- A question whether a statute under which a defendant had been convicted was unconstitutional was not moot, even though it had been repealed after the conviction, as a judgment of conviction had been entered, and a general savings clause permitted it to be carried into effect.
- Wyo.—[Schakel v. State](#), 513 P.2d 412 (Wyo. 1973).
- 13 U.S.—[Hicklin v. Orbeck](#), 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).
- Court rule repealed**
- U.S.—[Hawkins v. Moss](#), 503 F.2d 1171 (4th Cir. 1974).
- Promulgation of court rules**

Debtors' class action seeking declaratory relief with regard to postjudgment garnishment proceedings was not rendered moot by the subsequent issuance of court rules, absent evidence that the debtors' rights were satisfied by the amendments.

U.S.—[Finberg v. Sullivan, 658 F.2d 93 \(3d Cir. 1980\)](#).

14

Rescission of regulation

Rescission of a moratorium regulation did not render moot an action challenging the constitutionality of a federal land policy and management act, in which a state sought a declaratory judgment whether the United States could constitutionally impose a moratorium on the disposal of public lands.

U.S.—[State of Nev. ex rel. Nevada State Bd. of Agriculture v. U.S., 512 F. Supp. 166 \(D. Nev. 1981\)](#), order aff'd, [699 F.2d 486 \(9th Cir. 1983\)](#).

Revision of policy

A claim that a strip search was unconstitutional was not rendered moot by the fact that the sheriff had revised the strip search policy.

U.S.—[Logan v. Shealy, 660 F.2d 1007 \(4th Cir. 1981\)](#).

15

Colo.—[Davidson v. Committee for Gail Schoettler, Inc., 24 P.3d 621 \(Colo. 2001\)](#).

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16 C.J.S. Constitutional Law § 225

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Constitutional Law

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§ 225. Voluntary cessation

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West's Key Number Digest

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The voluntary cessation of a course of official conduct does not necessarily render a constitutional challenge to it moot.

A challenge of a course of official conduct, on constitutional grounds, is not rendered moot by its voluntary cessation¹ where the defendant is free to resume it² and where relief against a future violation of a constitutional right is being sought.³ Thus, when a statute being challenged is amended or repealed, a court should consider whether the defendant's voluntary cessation of the alleged constitutional violation has rendered the case moot because the legislature has eliminated the challenged provisions.⁴ The fact that a state legislature enacted a revised redistricting plan following a district court's determination that an earlier plan violated the Equal Protection Clause did not render an appeal from that determination moot where the legislation provided that the State would revert to the earlier plan if the determination is reversed on appeal.⁵

CUMULATIVE SUPPLEMENT

Cases:

State financial regulators' voluntary cessation of inquiries regarding financial advisor did not moot financial advisor's § 1983 action against them for retaliation for his political speech in violation of First Amendment, in which financial advisor sought declaratory judgment and injunctive relief, where state financial regulation department continued to have regulatory authority over financial advisor, and regulators' assurances that they knew better than to retaliate against him against were not sufficient to make it absolutely clear that the allegedly wrongful behavior could not have reasonably been expected to recur. [U.S.C.A. Const. Amend. 1; 42 U.S.C.A. § 1983. Bennie v. Munn, 822 F.3d 392 \(8th Cir. 2016\).](#)

Updated institutional supplement issued by federal Bureau of Prisons (BOP) establishing specific policies for prison facility's review of incoming publications and declaration by prison warden that the supplement would apply going forward, that the 11 previously rejected prison magazines would not be rejected under that supplement, and that the BOP's initial rejections of delivery of the magazines to inmate subscribers were improper, rendered moot any request by magazine publisher for injunctive relief to prevent BOP from rejecting future publications that were substantially similar to 11 previously rejected publications, in publisher's action alleging the BOP censored its First Amendment-protected speech. [U.S. Const. Amend. 1. Prison Legal News v. Federal Bureau of Prisons, 944 F.3d 868 \(10th Cir. 2019\).](#)

Artist and art gallery operator's claim of ongoing viewpoint discrimination under the First Amendment, based on a prior United States Postal Service (USPS) policy under which their custom postage design was rejected because it was incompatible with the program's ban on political designs, was not moot due to USPS's voluntary cessation; although policy was superseded and was administered by a since-deauthorized vendor, and thus, USPS's voluntary actions brought an end to some aspects of the claimed injury, artist and operator contended that USPS continued to cause their viewpoint-discrimination injury by permitting other political messages to circulate on previously printed customized postage, while having denied them the same opportunity. [U.S. Const. Amend. 1. Zukerman v. United States Postal Service, 961 F.3d 431 \(D.C. Cir. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—[Gatling v. Butler, 52 F.R.D. 389 \(D. Conn. 1971\).](#)

2 U.S.—[Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 \(1980\).](#)

Examination and licensing

In view of the fact that a revised rule for examining and licensing hoisting engineers allowed a licensing board to choose either an oral or written examination, an issue whether the former rule permitting the board to administer oral examinations violated fundamental due process was not moot.

R.I.—[Millett v. Hoisting Engineers' Licensing Division of Dept. of Labor, 119 R.I. 285, 377 A.2d 229 \(1977\).](#)

3 U.S.—[D'Andrea v. Adams, 626 F.2d 469 \(5th Cir. 1980\).](#)

4 La.—[Cat's Meow, Inc. v. City of New Orleans Through Dept. of Finance, 720 So. 2d 1186 \(La. 1998\).](#)

5 U.S.—[Hunt v. Cromartie, 526 U.S. 541, 119 S. Ct. 1545, 143 L. Ed. 2d 731 \(1999\).](#)

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3. Proceedings in Which Question May Be Raised

a. Overview

§ 226. Proceedings in which constitutional question may be raised, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  968, 975

Constitutional questions may be raised in appropriate proceedings but generally not in a collateral proceeding.

The constitutionality of a penal statute may be tested in any criminal proceeding in which its consideration is necessary.¹ However, the constitutionality of a statute establishing subsequent consequences of a criminal conviction in a civil matter may not be justiciable in the criminal case.²

There is a general principle that it is preferable that constitutional attacks on state statutes be raised defensively in state court proceedings rather than in proceedings initiated in federal court, which is applicable in disciplinary proceedings and criminal cases.³

Ordinarily, the constitutionality of a statute will not be determined in a collateral proceeding,⁴ such as to revoke a license or permit after a conviction on the underlying violation of the statute in question.⁵ Thus, an attorney does not have standing in

a disciplinary proceeding to argue the constitutionality of a federal court action⁶ or of a law violated by the attorney⁷ leading to the disciplinary charge.

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Footnotes

- 1 U.S.—[U.S. v. Gourley](#), 502 F.2d 785 (10th Cir. 1973).
- 2 Ga.—[Chancey v. State](#), 256 Ga. 415, 349 S.E.2d 717 (1986).
- 3 U.S.—[Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio](#), 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).
- 4 U.S.—[Poulos v. State of N.H.](#), 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953).
Ill.—[People ex rel. Houghland v. Leonard](#), 415 Ill. 135, 112 N.E.2d 697 (1953).
Md.—[Schneider v. Pullen](#), 198 Md. 64, 81 A.2d 226 (1951).
Okla.—[Jones v. Eads](#), 97 Okla. Crim. 225, 261 P.2d 633 (1953).
Utah—[Dewey v. Doxey-Layton Realty Co.](#), 3 Utah 2d 1, 277 P.2d 805 (1954) (overruled on other grounds by, [Carter v. Lehi City](#), 2012 UT 2, 269 P.3d 141 (Utah 2012)).
- 5 **Driver's license**
Since the constitutionality of a traffic ordinance proscribing careless driving was an integral part of a conviction for a violation of that ordinance, a convicted motorist may not challenge its constitutionality in a collateral proceeding to revoke his driver's license in accordance with the point system.
Neb.—[State, Dept. of Motor Vehicles v. Lessert](#), 188 Neb. 243, 196 N.W.2d 166 (1972).
- Hunting privileges**
A hunter could not collaterally attack his violation of a game law in an administrative proceeding relative to the revocation of his hunting privileges; the challenge to the constitutionality of the game law should have been made directly against a charge of the game law violation.
Pa.—[Malishaucki v. Com., Pennsylvania Game Commission](#), 58 Pa. Commw. 354, 427 A.2d 787 (1981).
Okla.—[State ex rel. Oklahoma Bar Ass'n v. Wolfe](#), 1996 OK 75, 919 P.2d 427 (Okla. 1996).
Neb.—[State ex rel. Nebraska State Bar Ass'n v. Roubicek](#), 225 Neb. 509, 406 N.W.2d 644 (1987).

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3. Proceedings in Which Question May Be Raised

a. Overview

§ 227. Statutory or writ proceedings

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  968, 975

Under certain circumstances, the constitutionality of a statute may be challenged in statutory review, mandamus, or habeas corpus proceedings.

A statutory review proceeding may be the proper vehicle to test the constitutionality of a statute.¹ A state administrative procedure act does not provide the proper method of challenging the constitutionality of an order of a state supreme court dealing with the regulation of lawyers; rather, a direct challenge to the constitutionality of the order must be litigated as an original action in a court of general jurisdiction.²

Mandamus has been generally accepted as a vehicle for challenging the constitutionality of a statute.³ While a statutory action in the nature of mandamus or prohibition may be allowed to determine whether a statute, ordinance, or regulation has been applied in an unconstitutional manner,⁴ it may not be utilized to test the constitutionality of a legislative enactment itself⁵ unless it is treated as an action for a declaratory judgment.⁶

Constitutional questions other than those provided for may not be litigated in certain statutory proceedings.⁷

Habeas corpus proceedings may be utilized to test the constitutionality of a statute⁸ under which the accused has been charged⁹ or tried and committed.¹⁰

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Footnotes

- 1 **Licensing standards**
U.S.—[Berger v. Board of Psychologist Examiners](#), 521 F.2d 1056 (D.C. Cir. 1975).
- 2 N.C.—[Beard v. North Carolina State Bar](#), 320 N.C. 126, 357 S.E.2d 694 (1987).
- 3 Ariz.—[Hudson v. Kelly](#), 76 Ariz. 255, 263 P.2d 362 (1953).
- Fla.—[Rice v. Arnold](#), 54 So. 2d 114 (Fla. 1951).
- Ky.—[Utz v. City of Newport](#), 252 S.W.2d 434 (Ky. 1952).
- La.—[Perez v. Edwards](#), 336 So. 2d 1072 (La. Ct. App. 1st Cir. 1976), writ refused, [337 So. 2d 519](#) (La. 1976) and writ refused, [337 So. 2d 872](#) (La. 1976).
- 4 **By attorney general**
Va.—[Troy v. Walker](#), 218 Va. 739, 241 S.E.2d 420 (1978).
- 5 Wis.—[City of Kenosha v. State](#), 35 Wis. 2d 317, 151 N.W.2d 36 (1967).
- 6 N.Y.—[Roosevelt Raceway, Inc. v. Nassau County](#), 18 N.Y.2d 30, 271 N.Y.S.2d 662, 218 N.E.2d 539 (1966).
- 7 N.Y.—[Kovarsky v. Housing and Development Administration of City of New York](#), 31 N.Y.2d 184, 335 N.Y.S.2d 383, 286 N.E.2d 882 (1972).
- N.Y.—[Board of Ed. of Belmont Central School Dist. v. Gootnick](#), 49 N.Y.2d 683, 427 N.Y.S.2d 777, 404 N.E.2d 1318 (1980).
- Utah—[Dewey v. Doxey-Layton Realty Co.](#), 3 Utah 2d 1, 277 P.2d 805 (1954) (overruled on other grounds by, [Carter v. Lehi City](#), 2012 UT 2, 269 P.3d 141 (Utah 2012)).
- Wis.—[Wisconsin Hydro Electric Co. v. Public Service Commission of Wisconsin](#), 234 Wis. 627, 291 N.W. 784 (1940).
- 8 **Statutory election contest**
Tex.—[Setliff v. Gorrell](#), 466 S.W.2d 74 (Tex. Civ. App. Amarillo 1971).
- 9 **Criminal sexual psychopath statute**
U.S.—[Davy v. Sullivan](#), 354 F. Supp. 1320, 17 Fed. R. Serv. 2d 1157 (M.D. Ala. 1973).
- Fla.—[Sandstrom v. Leader](#), 370 So. 2d 3 (Fla. 1979).
- 10 Cal.—[In re McNeal](#), 32 Cal. App. 2d 391, 89 P.2d 1096 (3d Dist. 1939).
- Minn.—[State ex rel. White v. Patterson](#), 188 Minn. 492, 249 N.W. 187 (1933).
- Vt.—[In re Squires](#), 114 Vt. 285, 44 A.2d 133, 161 A.L.R. 349 (1945).

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3. Proceedings in Which Question May Be Raised

a. Overview

§ 228. Action for injunction

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  968, 975

The constitutionality of statutes may be determined in actions for injunctions, but not on applications for preliminary or temporary injunctions, or in contempt proceedings.

In some jurisdictions, the constitutionality of a statute may, in a proper case, be determined on an application for an injunction to restrain action under it,¹ but even in a jurisdiction where the rule has been otherwise,² a well established exception has permitted such an action when injunctive relief is essential to the protection of property rights and the rights of persons against injuries otherwise remediable.³ Seeking an injunction from a trial court, instead of filing an original action in a state supreme court, may be the preferred method of raising a constitutional issue although, in rare circumstances, the supreme court will, in the interest of judicial economy, reach the merits of a particular dispute.⁴

Ordinarily, the constitutionality of a statute will not be determined on an application for a preliminary injunction⁵ due to the lack of opportunity for deliberation.⁶ Similarly, a decision on constitutionality will not be made on a ruling on a request for a temporary injunction⁷ or in an action for an accounting for a breach of a duty imposed by the statute.⁸

The constitutionality of a statute under which an injunction is issued may not be questioned in a contempt proceeding brought after the violation of the injunction,⁹ but it may be questioned in a proceeding to have the injunction modified or dissolved.¹⁰

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Footnotes

- 1 Fla.—[Rice v. Arnold](#), 54 So. 2d 114 (Fla. 1951).
Md.—[Schneider v. Pullen](#), 198 Md. 64, 81 A.2d 226 (1951).
Mich.—[General Motors Corporation v. Read](#), 294 Mich. 558, 293 N.W. 751, 130 A.L.R. 429 (1940).
- 2 N.C.—[Jarrell v. Snow](#), 225 N.C. 430, 35 S.E.2d 273 (1945).
- 3 N.C.—[Jernigan v. State](#), 279 N.C. 556, 184 S.E.2d 259 (1971).
- 4 Wash.—[Washington State Labor Council v. Reed](#), 149 Wash. 2d 48, 65 P.3d 1203 (2003).
- 5 U.S.—[Seagram-Distillers Corp. v. New Cut Rate Liquors](#), 221 F.2d 815 (7th Cir. 1955).
La.—[Capitol City Towing & Recovery, Inc. v. State, ex rel. Department of Public Safety & Corrections](#), 842 So. 2d 321 (La. 2003).
N.C.—[Bulova Watch Co., Inc. v. Brand Distributors of North Wilkesboro, Inc.](#), 18 N.C. App. 482, 197 S.E.2d 85 (1973).
- 6 U.S.—[UV Industries, Inc. v. Posner](#), 466 F. Supp. 1251 (D. Me. 1979).
- 7 Ill.—[Toushin v. City of Chicago](#), 23 Ill. App. 3d 797, 320 N.E.2d 202 (1st Dist. 1974).
Tex.—[Henson v. Denison](#), 546 S.W.2d 898 (Tex. Civ. App. Fort Worth 1977).
- Temporary restraining order**
Ga.—[Wilson v. Strange](#), 235 Ga. 156, 219 S.E.2d 88 (1975).
S.C.—[Dillon County v. Maryland Cas. Co.](#), 217 S.C. 66, 59 S.E.2d 640 (1950).
- 8 U.S.—[Walker v. City of Birmingham](#), 388 U.S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967).
- Public employee labor dispute**
A teachers' union, which had not exhausted statutory procedures available for the resolution of public sector labor disputes, may not challenge, in a contempt proceeding, the constitutionality of a statute prohibiting strikes by public teachers.
Mass.—[Labor Relations Com'n v. Chelsea Teachers' Union](#), 400 Mass. 120, 507 N.E.2d 1051, 39 Ed. Law Rep. 297 (1987).
U.S.—[Walker v. City of Birmingham](#), 388 U.S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967).
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3. Proceedings in Which Question May Be Raised

b. Stage of Proceeding

§ 229. Stage of proceeding at which constitutional issue decided

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  968, 975

A constitutional issue should usually be first decided by a trial court, and while it may be proper to decide it on the pleadings or on summary judgment, evidence must usually be taken.

While a state supreme court has the authority to address constitutional issues, it is only obligated to rule on the question if the procedural posture of the case and the relief sought by the appellant requires that it do so.¹ Ordinarily, the initial challenge to the constitutionality of a statute should be made before a trial court² although a very limited exception to this rule is recognized in cases where the statute at issue is clearly unconstitutional on its face.³ It has been said it is inappropriate for a state supreme court, *sua sponte*, to consider whether a statute has been constitutionally applied since the court, as a reviewing court, is not an arbiter of the facts.⁴

While the constitutionality of a statute may be considered where no further pleadings or evidence are necessary,⁵ such as where a determination whether a statute facially violates the First Amendment is made based on the statute's language alone,⁶ the issue

should not be decided on the pleadings where facts necessary to the determination can be ascertained in further proceedings.⁷ It is also generally improper to reach constitutional issues in a proceeding on an interlocutory order.⁸ Nevertheless, a decision of a constitutional issue may be decided on a motion for a summary judgment,⁹ particularly where a refusal to do so would deprive a party of a constitutional right to a prompt remedy.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

On a motion to dismiss for failure to state a claim, in an action asserting a claim under the Free Speech Clause, the court does not ask whether the complaint meets any probability requirement, but asks only whether the complaint plausibly alleges a violation of the Free Speech Clause. [U.S. Const. Amend. 1; Fed. R. Civ. P. 12\(b\)\(6\). Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc.](#), 942 F.3d 1215 (11th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 La.—[Ring v. State, Dept. of Transp. and Development](#), 835 So. 2d 423 (La. 2003).
- 2 Fla.—[Allen v. Butterworth](#), 756 So. 2d 52 (Fla. 2000).
- 3 La.—[Prejean v. Barousse](#), 107 So. 3d 569 (La. 2013).
As to the power of an inferior court to determine constitutional questions, see § 210.
- 4 As to appellate consideration of constitutional questions not raised in the trial court, see [C.J.S., Appeal and Error](#) § 300.
- 5 La.—[Prejean v. Barousse](#), 107 So. 3d 569 (La. 2013).
- 6 Ill.—[People v. Mosley](#), 2015 IL 115872, 2015 WL 728095 (Ill. 2015).
As to as-applied constitutional challenges, see § 243.
- 7 U.S.—[Board of Managers of Ark. Training School for Boys at Wrightsville v. George](#), 377 F.2d 228 (8th Cir. 1967).
- 8 Wash.—[City of Seattle v. Webster](#), 115 Wash. 2d 635, 802 P.2d 1333, 7 A.L.R.5th 1100 (1990).
- 9 N.C.—[Union Carbide Corp. v. Davis](#), 253 N.C. 324, 116 S.E.2d 792 (1960).
As to proceedings for preliminary or temporary injunctions, see § 228.
- 10 Iowa—[Stoller Fisheries, Inc. v. American Title Ins. Co.](#), 258 N.W.2d 336 (Iowa 1977).
- 10 Wis.—[Werner v. Milwaukee Solvay Coke Co.](#), 252 Wis. 392, 31 N.W.2d 605 (1948).

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b. Stage of Proceeding

§ 230. Exhaustion of administrative remedies

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  968, 983

Exhaustion of remedies may not be required to challenge the constitutionality of a statute on its face but is required for challenges to a statute as applied or to the discriminatory application of a statute or where an administrative remedy would obviate the need to address the constitutional question.

It is generally not necessary to exhaust administrative remedies before challenging the constitutionality of a statute, if it is attacked as unconstitutional on its face,¹ where the agency does not have the authority to determine if the acts it administers are constitutional or to resolve constitutional claims.² However, the mere assertion that a constitutional right has been violated does not, by itself, obviate the requirement that a party exhaust administrative remedies.³ Thus, it may be necessary to exhaust remedies to be in a position to assert that a law or requirement is unconstitutional as applied⁴ or as implemented by agency rules⁵ or where it is contended that a statute, admittedly valid on its face, is applied in a discriminatory or arbitrary manner.⁶ Another distinction is that exhaustion of administrative remedies is not required if the challenge is to the constitutionality of the statute or regulation under which an agency operates rather than to the agency's actions.⁷

Exhaustion is required where relief might be obtained through a statutory administrative process.⁸ Therefore, a state does have the power to channel appeals challenging the constitutionality of tax statutes to an administrative process and tax court so long as those remedies are adequate.⁹ Similarly, a taxpayer seeking a refund based on the unconstitutionality of an agency rule may be required to complete the administrative process before proceeding to court.¹⁰

Exhaustion may be required where administrative action may resolve the case on another basis without the need to confront the broader constitutional issues.¹¹ It may be required that a challenge to a zoning ordinance be first presented to the local zoning authority because it can legislatively amend that ordinance even though it cannot rule on its constitutionality.¹²

The need for fact findings may justify a requirement that the issue be first considered by an administrative agency.¹³ Conversely, submitting to the agency's jurisdiction is not necessary where the agency's expertise in making factual determinations is not relevant to the challenger's legal claim of unconstitutionality.¹⁴

It has been stated that the question whether a court should intervene in the administrative process to decide constitutional issues is one of policy rather than power, involving a determination whether the circumstances require the resolution of the constitutional question to assure a predicate for the administrative proceeding.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Exhaustion requirement could not be waived for constitutional claims that Medicare service provider brought against government prior to final decision by agency that were not entirely collateral to its substantive entitlement claims; provider alleged "class-of-one" and racial discrimination equal-protection claims, First Amendment claim, and due-process claim alleging that state surveyors subjected them to inordinate number of surveys and administrative complaints, issued harsh findings and reports, and failed to provide specific information regarding Medicare termination, all without rational basis. *U.S. Const. Amend. 1, 4, 14; Social Security Act § 205, 42 U.S.C.A. § 405(g). Home Care Providers, Inc. v. Hemmelgarn*, 861 F.3d 615 (7th Cir. 2017).

Exception for constitutional claims was inapplicable in inmate's challenge to determination in prison disciplinary proceeding, and thus his failure to file a timely administrative appeal from that determination constituted a failure to exhaust his administrative remedies; since inmate was challenging specific fact-dependent aspects of the disciplinary hearing, including the adequacy of his assistance, the sufficiency of the misbehavior report, the alleged denial of documents and witnesses and the adequacy of the written disposition, the resolution of which required development of an administrative record, they should have first been addressed to the agency having responsibility. *Hyatt v. Annucci*, 134 A.D.3d 1359, 22 N.Y.S.3d 253 (3d Dep't 2015).

Recipients of parking tickets when city had installed pay machines, but when ordinance still defined parking infractions by reference to parking meters, forfeited their claims of unjust enrichment and that attorney fees provision of city code violated their due process rights in their putative class action against city; recipients, with exception of one recipient's successful challenge to one of his tickets, did not exhaust their legal remedies for challenging imposition of parking fines, as they failed to challenge their tickets before hearing officers and in small claims court. *Utah Const. art. 1, § 7. Bivens v. Salt Lake City Corporation*, 2017 UT 67, 416 P.3d 338 (Utah 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 Colo.—[Horrell v. Department of Admin.](#), 861 P.2d 1194 (Colo. 1993).
Fla.—[Sarnoff v. Florida Dept. of Highway Safety and Motor Vehicles](#), 825 So. 2d 351 (Fla. 2002).
Ill.—[Canel v. Topinka](#), 212 Ill. 2d 311, 288 Ill. Dec. 623, 818 N.E.2d 311 (2004).
Ky.—[Kentucky Board of Medical Licensure v. Chaney](#), 2014 WL 5488174 (Ky. Ct. App. 2014).
Md.—[Comptroller of the Treasury v. Zorxit](#), 221 Md. App. 274, 108 A.3d 581 (2015).
- Constitutional challenge to tax**
While facial constitutional challenges to a tax may bypass the administrative exhaustion requirement, as-applied constitutional challenges hinging on factual determinations cannot.
Nev.—[Deja Vu Showgirls v. State, Dept. of Tax.](#), 334 P.3d 392, 130 Nev. Adv. Op. No. 73 (Nev. 2014).
- 2 Colo.—[Horrell v. Department of Admin.](#), 861 P.2d 1194 (Colo. 1993).
La.—[Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n](#), 646 So. 2d 885 (La. 1994).
N.Y.—[Kravitz v. DiNapoli](#), 122 A.D.3d 1199, 997 N.Y.S.2d 801 (3d Dep't 2014).
Okla.—[Waste Connections, Inc. v. Oklahoma Dept. of Environmental Quality](#), 2002 OK 94, 61 P.3d 219 (Okla. 2002).
S.C.—[Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue](#), 342 S.C. 34, 535 S.E.2d 642 (2000).
As to whether an administrative agency has the authority to rule on constitutional issues, see § 211.
- 3 N.H.—[Konefal v. Hollis/Brookline Co-op. School Dist.](#), 143 N.H. 256, 723 A.2d 30, 132 Ed. Law Rep. 151 (1998).
- 4 Ky.—[Com. v. DLX, Inc.](#), 42 S.W.3d 624 (Ky. 2001).
Md.—[Montgomery County v. Broadcast Equities, Inc.](#), 360 Md. 438, 758 A.2d 995 (2000).
Vt.—[Choquette v. Perrault](#), 144 Vt. 218, 475 A.2d 1078 (1984).
Wash.—[Rhod-A-Zalea & 35th, Inc. v. Snohomish County](#), 136 Wash. 2d 1, 959 P.2d 1024 (1998).
- 5 Fla.—[Sarnoff v. Florida Dept. of Highway Safety and Motor Vehicles](#), 825 So. 2d 351 (Fla. 2002).
- 6 Ill.—[Walker v. State Bd. of Elections](#), 65 Ill. 2d 543, 3 Ill. Dec. 703, 359 N.E.2d 113 (1976).
N.J.—[Fred Depkin & Son, Inc. v. Director, New Jersey Division of Taxation](#), 114 N.J. Super. 279, 276 A.2d 161 (App. Div. 1971).
- 7 Conn.—[Stepney, LLC v. Town of Fairfield](#), 263 Conn. 558, 821 A.2d 725 (2003).
Conn.—[School Administrators Ass'n of New Haven v. Dow](#), 200 Conn. 376, 511 A.2d 1012, 33 Ed. Law Rep. 785 (1986).
- Review of labor complaint**
City employees' claim that they were denied equal protection, based upon alleged unfair labor practices, which, once resolved, might remedy the alleged disparity, would not become ripe until a state employment relations board reviewed it.
Ohio—[Consolo v. Cleveland](#), 103 Ohio St. 3d 362, 2004-Ohio-5389, 815 N.E.2d 1114 (2004).
- 9 Ind.—[State v. Sproles](#), 672 N.E.2d 1353 (Ind. 1996).
Fla.—[Sarnoff v. Florida Dept. of Highway Safety and Motor Vehicles](#), 825 So. 2d 351 (Fla. 2002).
- 10 Ind.—[First American Title Ins. Co. v. Robertson](#), 19 N.E.3d 757 (Ind. 2014), amended on other grounds on reh'g, 2015 WL 1400822 (Ind. 2015).
N.H.—[Konefal v. Hollis/Brookline Co-op. School Dist.](#), 143 N.H. 256, 723 A.2d 30, 132 Ed. Law Rep. 151 (1998).
- 11 Okla.—[Waste Connections, Inc. v. Oklahoma Dept. of Environmental Quality](#), 2002 OK 94, 61 P.3d 219 (Okla. 2002).
As to resolving the case on other than constitutional grounds, generally, see § 213.
- 12 Ga.—[Outdoor Systems, Inc. v. Cobb County](#), 274 Ga. 606, 555 S.E.2d 689 (2001).
- Education matter**
A challenge to a state's plan for funding public school education, as allegedly violating the "thorough and efficient education" clause of a state constitution and both the state and federal equal protection clauses,

should be considered, in the first instance, by the appropriate administrative agency, since the constitutional issues were especially fact sensitive and related primarily to areas of educational specialization.

N.J.—[Abbott v. Burke, 100 N.J. 269, 495 A.2d 376, 26 Ed. Law Rep. 670 \(1985\)](#).

Record before tax appeal board

When a tax statute is challenged on the basis that it is unconstitutional in its application, a court needs a record and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting that view, and it is reasonable that a state board of tax appeals be the forum where that evidence may be received even if the board may not declare the statute unconstitutional.

Ohio—[Cleveland Gear Co. v. Limbach, 35 Ohio St. 3d 229, 520 N.E.2d 188 \(1988\)](#).

14

Conn.—[Payne v. Fairfield Hills Hosp., 215 Conn. 675, 578 A.2d 1025 \(1990\)](#).

15

Fla.—[Rice v. Department of Health and Rehabilitative Services, 386 So. 2d 844 \(Fla. 1st DCA 1980\)](#).

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16 C.J.S. Constitutional Law § 231

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

4. Manner of Raising Issue

§ 231. Necessity of presenting question

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  949, 975

Constitutional questions must generally be properly presented by the pleadings and appellate briefs although they may be considered if inherently involved in the determination of the case.

A court should proceed with reluctance to set aside legislation as unconstitutional on grounds not properly presented.¹ As a general rule, a court will not inquire into the constitutionality of a statute or other governmental action on its own motion but will consider only those constitutional questions that are properly placed at issue by the litigants² and are adequately argued and briefed.³ The invalidity of a statute must ordinarily be specifically raised by the pleadings,⁴ and the grounds for the challenge must be particularized.⁵ This is not an inflexible rule, however, and in some instances, constitutional questions inherently involved in the determination of the case may be considered even though they may not have been raised as required by orderly procedure.⁶ Thus, constitutional questions not raised as required by proper procedure may be decided where matters of public concern are involved⁷ or where the statute is clearly unconstitutional on its face.⁸ Also, it is not necessary to explicitly plead unconstitutionality if the statute at issue has already been held invalid in another case.⁹

To assert separate and independent constitutional claims, an appellant must raise each issue with the trial court.¹⁰

State or federal constitution.

Before a court will undertake a separate analysis whether a state constitutional provision affords greater protection than the U.S. Constitution, the parties are required to argue in their briefs that that analysis is required.¹¹ A litigant relying on a state constitution must adequately brief the state constitutional law issues¹² rather than make federal constitutional arguments and then mention, as an afterthought, that the act in question also violates state constitutional law, without further explanation.¹³

CUMULATIVE SUPPLEMENT

Cases:

The Supreme Court will address issues of constitutional significance only when the matter is squarely and necessarily presented. *In re Affidavit of Probable Cause*, 2019 VT 43, 215 A.3d 694 (Vt. 2019).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—*McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S. Ct. 670, 84 L. Ed. 849 (1940).

2 U.S.—*Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947); U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940). Ark.—*Parham v. State*, 262 Ark. 241, 555 S.W.2d 943 (1977).

Fla.—*State v. Turner*, 224 So. 2d 290 (Fla. 1969).

Ga.—*Robinson v. McLennan*, 224 Ga. 415, 162 S.E.2d 314 (1968).

Iowa—*Buda v. Fulton*, 261 Iowa 981, 157 N.W.2d 336 (1968).

Kan.—*McGowen v. Southwestern Bell Tel. Co.*, 215 Kan. 887, 529 P.2d 97 (1974).

La.—*State v. Brewster*, 764 So. 2d 945 (La. 2000).

Md.—*State v. Franklin*, 281 Md. 51, 375 A.2d 1116 (1977).

Mass.—*School Committee of Springfield v. Board of Ed.*, 362 Mass. 417, 287 N.E.2d 438 (1972).

Mo.—*City of St. Louis v. Missouri Commission on Human Rights*, 517 S.W.2d 65 (Mo. 1974).

N.C.—*State v. Fayetteville St. Christian School*, 299 N.C. 351, 261 S.E.2d 908 (1980), on reh'g, 299 N.C. 731, 265 S.E.2d 387 (1980).

Pa.—*Com. v. Staub*, 461 Pa. 486, 337 A.2d 258 (1975).

W. Va.—*State ex rel. Scott v. Taylor*, 152 W. Va. 151, 160 S.E.2d 146 (1968).

Fully presented

Constitutional questions are too important to be answered by the supreme court at random and should not be answered unless fully presented.

Wyo.—*Hageman v. Goshen County School Dist. No. 1*, 2011 WY 91, 256 P.3d 487, 269 Ed. Law Rep. 345 (Wyo. 2011).

Failure to assert status

The supreme court was not required to address the constitutionality of the collection of a jury trial fee from indigents in a litigant's class action against the court clerk, alleging that such fees violated the state constitution, where the litigant did not assert his status or the class's status as indigent.

Okla.—*Barzellone v. Presley*, 2005 OK 86, 126 P.3d 588 (Okla. 2005).

- 3 Alaska—[Dominish v. State, Commercial Fisheries Entry Com'n](#), 907 P.2d 487 (Alaska 1995).
Conn.—[Ramos v. Town of Vernon](#), 254 Conn. 799, 761 A.2d 705 (2000).
Ill.—[People v. Cornelius](#), 213 Ill. 2d 178, 290 Ill. Dec. 237, 821 N.E.2d 288 (2004).
Neb.—[Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.](#), 265 Neb. 918, 663 N.W.2d 43 (2003).
N.D.—[Overboe v. Farm Credit Services of Fargo](#), 2001 ND 58, 623 N.W.2d 372 (N.D. 2001).
Pa.—[Com. v. White](#), 543 Pa. 45, 669 A.2d 896 (1995).
R.I.—[Henry v. Earhart](#), 553 A.2d 124, 51 Ed. Law Rep. 959 (R.I. 1989).
Wis.—[Wisconsin Professional Police Ass'n, Inc. v. Lightbourn](#), 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807 (2001).
Wyo.—[Witzenburger v. State ex rel. Wyoming Community Development Authority](#), 575 P.2d 1100 (Wyo. 1978).
- Constitutional claim must provide persuasive authority and reasoning**
- N.D.—[Sorum v. Dalrymple](#), 2014 ND 233, 857 N.W.2d 96 (N.D. 2014).
4 Fla.—[State v. Turner](#), 224 So. 2d 290 (Fla. 1969).
Iowa—[Cole v. City of Osceola](#), 179 N.W.2d 524 (Iowa 1970).
Kan.—[In re Wimberly Chapel Baptist Church of Osage County](#), 170 Kan. 684, 228 P.2d 540 (1951).
La.—[State v. Dawson](#), 154 So. 3d 574 (La. Ct. App. 1st Cir. 2014).
Miss.—[City of Jackson v. Lakeland Lounge of Jackson, Inc.](#), 688 So. 2d 742, 67 A.L.R.5th 719 (Miss. 1996).
N.C.—[Anderson v. Assimos](#), 356 N.C. 415, 572 S.E.2d 101 (2002).
R.I.—[Chernov Enterprises, Inc. v. Sarkas](#), 109 R.I. 283, 284 A.2d 61 (1971).
Tex.—[In re Doe 2](#), 19 S.W.3d 278 (Tex. 2000).
As to the specificity of the allegations, see § 232.
As to appellate consideration of constitutional questions not raised in the trial court, see [C.J.S., Appeal and Error § 300](#).
- 5 La.—[State v. Dawson](#), 154 So. 3d 574 (La. Ct. App. 1st Cir. 2014).
6 Colo.—[Howell v. Woodlin School Dist. R-104](#), 198 Colo. 40, 596 P.2d 56 (1979) (overruled on other grounds by, [deKoevend v. Board of Educ. of West End School Dist. RE-2](#), 688 P.2d 219, 20 Ed. Law Rep. 702 (Colo. 1984)).
Kan.—[VanSickle v. Shanahan](#), 212 Kan. 426, 511 P.2d 223 (1973).
Mo.—[State ex rel. Williams v. Marsh](#), 626 S.W.2d 223 (Mo. 1982).
Wis.—[State v. Holmes](#), 106 Wis. 2d 31, 315 N.W.2d 703 (1982).
- Oral defense to motion**
- R.I.—[State v. Garnetto](#), 75 R.I. 86, 63 A.2d 777 (1949).
7 Mo.—[State ex rel. McMonigle v. Spears](#), 358 Mo. 23, 213 S.W.2d 210 (1948).
Tenn.—[Remine v. Knox County](#), 182 Tenn. 680, 189 S.W.2d 811 (1945).
8 U.S.—[Board of Managers of Ark. Training School for Boys at Wrightsville v. George](#), 377 F.2d 228 (8th Cir. 1967).
Ala.—[Cooper v. Hawkins](#), 234 Ala. 636, 176 So. 329 (1937).
Tex.—[Lovejoy v. Lillie](#), 569 S.W.2d 501 (Tex. Civ. App. Tyler 1978), writ refused n.r.e., (Nov. 29, 1978).
9 La.—[State v. Cormier](#), 171 La. 1035, 132 So. 779 (1931).
10 Colo.—[City and County of Broomfield v. Farmers Reservoir and Irrigation Co.](#), 239 P.3d 1270 (Colo. 2010).
Conn.—[Ramos v. Town of Vernon](#), 254 Conn. 799, 761 A.2d 705 (2000).
11 Wash.—[Eggleston v. Pierce County](#), 148 Wash. 2d 760, 64 P.3d 618 (2003).
12 Conn.—[State v. Campbell](#), 225 Conn. 650, 626 A.2d 287 (1993).
N.H.—[State v. Steed](#), 140 N.H. 153, 665 A.2d 1072 (1995).
Or.—[Billings v. Gates](#), 323 Or. 167, 916 P.2d 291 (1996).
Utah—[Midvale City Corp. v. Haltom](#), 2003 UT 26, 73 P.3d 334 (Utah 2003).
13 Wash.—[First Covenant Church of Seattle v. City of Seattle](#), 120 Wash. 2d 203, 840 P.2d 174 (1992).
Utah—[Midvale City Corp. v. Haltom](#), 2003 UT 26, 73 P.3d 334 (Utah 2003).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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§ 232. Specificity of pleading

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To warrant the determination of constitutional questions, the invalidity of a statute or other governmental action must be distinctly raised, and general, vague, or indefinite attacks on a statute will not be considered.

While it has been said that the determination whether the issue of the unconstitutionality of a statute is properly presented is to be made by construing the pleadings according to the usual rules,¹ it has also been stated that general rules of pleading must yield to the specific requirement that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized.² To warrant a court declaring a statute or government action void, its invalidity must be distinctly raised.³ Constitutional challenges to statutes or ordinances must be specific⁴ as it is incumbent upon one raising the specter that a statute is unconstitutional to state, at least in somewhat express terms, the specific constitutional grounds upon which the challenger is basing its attack on the legislation.⁵ General⁶ or vague and indefinite⁷ attacks will not be considered. A constitutional question is not raised by statements of legal conclusions.⁸ The bare assertion⁹ or suggestion¹⁰ that a statute is unconstitutional is insufficient to raise a constitutional issue. Constitutional questions are not entertained on dubious presentations or when a

presentation may be taken as not intended to put those questions forward squarely and inescapably.¹¹ Instead, the facts showing the unconstitutionality of the enactment or official action must clearly appear.¹²

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Footnotes

- 1 Kan.—[Owen v. Mutual Ben. Health & Acc. Ass'n](#), 171 Kan. 457, 233 P.2d 706 (1951).
 - 2 La.—[Louisiana Assessors' Retirement Fund v. City Of New Orleans](#), 864 So. 2d 200 (La. 2004).
 - 3 U.S.—[Eisen v. Eastman](#), 421 F.2d 560 (2d Cir. 1969).
 - 4 Ga.—[DeKalb County v. Post Properties, Inc.](#), 245 Ga. 214, 263 S.E.2d 905 (1980).
 - 5 Iowa—[State v. Moore](#), 276 N.W.2d 437 (Iowa 1979).
 - 6 N.C.—[State v. Davis](#), 270 N.C. 1, 153 S.E.2d 749 (1967).
 - 7 R.I.—[Town of Foster v. Lamphere](#), 117 R.I. 541, 368 A.2d 1238 (1977).
 - 8 S.C.—[State v. Taylor](#), 223 S.C. 526, 77 S.E.2d 195 (1953).
 - 9 Wyo.—[Doe v. Burk](#), 513 P.2d 643 (Wyo. 1973).
 - 10 Iowa—[Cyclone Sand and Gravel Co. v. Zoning Bd. of Adjustment of City of Ames](#), 351 N.W.2d 778 (Iowa 1984).
 - 11 Pa.—[In re F.C. III](#), 607 Pa. 45, 2 A.3d 1201 (2010).
 - 12 U.S.—[U.S. v. Carroll](#), 567 F.2d 955 (10th Cir. 1977); [Velvel v. Nixon](#), 415 F.2d 236 (10th Cir. 1969).
 - 13 Ga.—[Stegall v. Southwest Georgia Regional Housing Authority](#), 197 Ga. 571, 30 S.E.2d 196 (1944).
 - 14 La.—[Olivedell Planting Co. v. Town of Lake Providence](#), 217 La. 621, 47 So. 2d 23 (1950).
 - 15 N.M.—[State v. Clark](#), 83 N.M. 484, 1971-NMCA-176, 493 P.2d 969 (Ct. App. 1971).
 - 16 S.C.—[State v. Taylor](#), 223 S.C. 526, 77 S.E.2d 195 (1953).
 - 17 U.S.—[Bankers Life and Cas. Co. v. Crenshaw](#), 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988).
 - 18 Ill.—[Biggs v. Cummins](#), 5 Ill. 2d 512, 126 N.E.2d 208 (1955).
 - 19 La.—[Olivedell Planting Co. v. Town of Lake Providence](#), 217 La. 621, 47 So. 2d 23 (1950).
 - 20 U.S.—[Campbell v. Supreme Court of Fla.](#), 428 F.2d 449 (5th Cir. 1970).
 - 21 Mass.—[McCarty's Case](#), 445 Mass. 361, 837 N.E.2d 669 (2005).
 - 22 Md.—[Lawrence v. State Dept. of Health](#), 247 Md. 367, 231 A.2d 46 (1967).
 - 23 N.D.—[New Town Public School Dist. No. 1 v. State Bd. of Public School Educ. of State](#), 2002 ND 127, 650 N.W.2d 813, 169 Ed. Law Rep. 412 (N.D. 2002).
 - 24 U.S.—[U.S. v. John](#), 508 F.2d 1134 (8th Cir. 1975).
 - 25 N.D.—[Sorum v. Dalrymple](#), 2014 ND 233, 857 N.W.2d 96 (N.D. 2014).
 - 26 R.I.—[State v. Berker](#), 112 R.I. 624, 314 A.2d 11 (1974).
 - 27 Wis.—[Allen v. Juneau County Forest Withdrawal Appeal Review Committee](#), 98 Wis. 2d 103, 295 N.W.2d 218 (Ct. App. 1980).
 - 28 Wyo.—[Meyer v. Norman](#), 780 P.2d 283 (Wyo. 1989).
- Abstract assertions**
- Conn.—[Taylor v. Robinson](#), 171 Conn. 691, 372 A.2d 102 (1976).
 - Ind.—[Phillips v. Stern](#), 145 Ind. App. 628, 252 N.E.2d 267 (1969).
 - Nev.—[State ex rel. City of Las Vegas v. Clark County](#), 58 Nev. 469, 83 P.2d 1050 (1938).
 - U.S.—[Aircraft & Diesel Equipment Corp. v. Hirsch](#), 331 U.S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947).
 - U.S.—[Snowden v. Hughes](#), 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944).
 - Ariz.—[Iman v. Southern Pac. Co.](#), 7 Ariz. App. 16, 435 P.2d 851 (1968).
 - Cal.—[State of California v. Superior Court](#), 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281 (1974).
 - Ind.—[Board of Com'r's of Howard County v. Kokomo City Plan Commission](#), 263 Ind. 282, 330 N.E.2d 92 (1975).
 - Iowa—[McSpadden v. Big Ben Coal Co.](#), 288 N.W.2d 181 (Iowa 1980).
 - Mass.—[Gallo v. Division of Water Pollution Control](#), 374 Mass. 278, 372 N.E.2d 1258 (1978).
 - Mo.—[United C.O.D. v. State](#), 150 S.W.3d 311 (Mo. 2004).
 - N.M.—[State ex rel. Martin v. Harris](#), 1941-NMSC-032, 45 N.M. 335, 115 P.2d 80 (1941).

R.I.—[State v. Carufel, 106 R.I. 739, 263 A.2d 686 \(1970\)](#).

First Amendment retaliation claim

Because direct evidence of retaliatory intent rarely can be pleaded in a complaint, allegation of a chronology of events from which retaliation can be inferred is sufficient to survive dismissal of First Amendment retaliation claim.

U.S.—[Watison v. Carter, 668 F.3d 1108 \(9th Cir. 2012\)](#).

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§ 233. Necessary allegations

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It must be alleged that a constitutional issue is necessarily involved in the case and that a party has standing to raise it, and any statute being challenged must be identified.

The allegations of a complaint about the constitutionality of a statute must establish that the validity of the statute is directly and necessarily involved in the controversy.¹ It must also be sufficiently alleged that some right is claimed on the basis of the invalidity of the statute² or that some actual or immediately threatened injury or invasion of rights will result from its application.³

To raise a question as to the constitutionality of a statute, the statute must be clearly specified,⁴ and at least, its substance must be stated even if its citation is not given.⁵ Where they are independent, the particular provisions of the statute at issue must be identified.⁶

Footnotes

- 1 Mo.—[State ex rel. Volker v. Carey](#), 345 Mo. 811, 136 S.W.2d 324 (1940).
Tex.—[Stone v. City of Dallas](#), 244 S.W.2d 937 (Tex. Civ. App. Waco 1951), dismissed.
W. Va.—[Ice v. Putnam County Court](#), 91 W. Va. 272, 112 S.E. 495 (1922).
As to the requirement that the constitutional question be necessarily involved, see §§ 212 et seq.
- 2 U.S.—[Socialist Labor Party v. Gilligan](#), 406 U.S. 583, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972).
Ariz.—[Day v. Board of Regents of University of Ariz.](#), 44 Ariz. 277, 36 P.2d 262 (1934).
Mass.—[Fournier v. Troianello](#), 332 Mass. 636, 127 N.E.2d 167 (1955).
Mich.—[General Motors Corporation v. Read](#), 294 Mich. 558, 293 N.W. 751, 130 A.L.R. 429 (1940).
Wyo.—[In re Gillette Daily Journal](#), 45 Wyo. 173, 17 P.2d 665 (1933).
- 3 U.S.—[Singleton v. Wulff](#), 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976).
Fla.—[Smith v. Ervin](#), 64 So. 2d 166 (Fla. 1953).
Ga.—[Bainbridge Farm Co. v. Bower](#), 194 Ga. 304, 21 S.E.2d 224 (1942).
Minn.—[Eldred v. Division of Employment and Sec., Dept. of Social Sec.](#), 209 Minn. 58, 295 N.W. 412 (1940).
Mont.—[Montana Auto. Ass'n v. Greely](#), 193 Mont. 378, 632 P.2d 300 (1981).
Standing to raise a constitutional question is discussed in § 215.
- Subjective "chill" not sufficient**
In attacking government action on First Amendment grounds, allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or threat of specific future harm.
- U.S.—[Laird v. Tatum](#), 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972).
- 4 Ga.—[Marchman & Marchman, Inc. v. City of Atlanta](#), 250 Ga. 64, 295 S.E.2d 311 (1982).
La.—[City of Shreveport v. Pedro](#), 170 La. 351, 127 So. 865 (1930).
- Citation to unofficial code sufficient**
Ga.—[Grantham v. State](#), 244 Ga. 775, 262 S.E.2d 777 (1979).
- Subsection of statute at issue**
La.—[Istre v. Meche](#), 770 So. 2d 776 (La. 2000).
- 5 Ga.—[Wiggins v. State](#), 249 Ga. 302, 290 S.E.2d 427 (1982).
- 6 Ill.—[Biggs v. Cummins](#), 5 Ill. 2d 512, 126 N.E.2d 208 (1955).
Iowa—[Buda v. Fulton](#), 261 Iowa 981, 157 N.W.2d 336 (1968).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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§ 234. Specification of constitutional provision

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The specific constitutional provision at issue must be identified, as well as how it was violated.

The specific constitutional provision that is allegedly violated by a statute or other government action must be identified.¹ A general reference to the constitutional provision, disclosing it with reasonable certainty² or an allegation calling attention to the particular right guaranteed by the constitution,³ is sometimes sufficient, and it is not necessary to set out the sections of the constitution violated or to refer to them by their numbers.⁴ However, other courts require a more specific designation,⁵ such as by article and section number or a quotation of the provision itself.⁶

A party attacking a statute or government action must also indicate in what manner or respect it violates the provision invoked.⁷ The party making the challenge must specifically state what particular rights were violated and the manner of their violation.⁸ General allegations of violations of the due process and equal protection guarantees are insufficient.⁹ It may be necessary to raise overbreadth and vagueness claims distinctly.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Allegation by plaintiff arrestee that state police officer maliciously prosecuted him in violation of Fourth Amendment and fabricated evidence against him in violation of Fourth and Fourteenth Amendments did not amount to anything more than formulaic recitation of elements of claim that could not survive motion to dismiss, since arrestee did not say how officer falsified evidence or participated in decision to prosecute him. [U.S. Const. Amends. 4, 14. Cantu v. Moody](#), 933 F.3d 414 (5th Cir. 2019).

Defendant who attempted to challenge constitutionality of statute which provides separate penalty for failure to submit to chemical test of blood, breath, or urine to determine the concentration of alcohol or drugs waived that issue, where defendant presented challenge in form of motion to suppress testimony of police officer who stopped him on suspicion of driving under the influence, rather than by means of motion to quash or demurrer. [Neb.Rev.St. § 60-6,197\(10\). State v. Kanarick](#), 257 Neb. 358, 598 N.W.2d 430 (1999).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ga.—[Cooper v. State](#), 277 Ga. 282, 587 S.E.2d 605 (2003).
Fla.—[Sandstrom v. Leader](#), 370 So. 2d 3 (Fla. 1979).
Ind.—[Board of Com'r's of Howard County v. Kokomo City Plan Commission](#), 263 Ind. 282, 330 N.E.2d 92 (1975).
Iowa—[McSpadden v. Big Ben Coal Co.](#), 288 N.W.2d 181 (Iowa 1980).
Kan.—[McVay v. Rich](#), 255 Kan. 371, 874 P.2d 641 (1994).
La.—[State v. Fleury](#), 799 So. 2d 468 (La. 2001).
Mich.—[Caterpillar, Inc. v. Department of Treasury, Revenue Div.](#), 440 Mich. 400, 488 N.W.2d 182 (1992).
Mo.—[St. Louis County v. Prestige Travel, Inc.](#), 344 S.W.3d 708 (Mo. 2011).
Neb.—[State, Dept. of Roads v. Melcher](#), 240 Neb. 592, 483 N.W.2d 540 (1992).
N.C.—[Porter v. Suburban Sanitation Service, Inc.](#), 283 N.C. 479, 196 S.E.2d 760 (1973).
N.D.—[Fenske v. Fenske](#), 542 N.W.2d 98 (N.D. 1996).
R.I.—[Mesolella v. City of Providence](#), 508 A.2d 661 (R.I. 1986).
Tenn.—[Williams v. Carr](#), 218 Tenn. 564, 404 S.W.2d 522 (1966).
Vt.—[Mellin v. Flood Brook Union School Dist.](#), 173 Vt. 202, 790 A.2d 408, 162 Ed. Law Rep. 369 (2001).
Wyo.—[State v. Stern](#), 526 P.2d 344 (Wyo. 1974).
2 Mich.—[McBride v. Jacob](#), 201 Mich. 525, 167 N.W. 1007 (1918).
Overbreadth issue
Under the circumstances of a case, a defendant's assertion that a statute prohibiting the possession of a billy was "overbroad" necessarily implied that the statute impinged upon the right to bear arms.
Or.—[State v. Blocker](#), 291 Or. 255, 630 P.2d 824 (1981) (overruled on other grounds by, [State v. Christian](#), 354 Or. 22, 307 P.3d 429 (2013)).
3 Ga.—[Buchanan v. Heath](#), 210 Ga. 410, 80 S.E.2d 393 (1954).
Tenn.—[Hughes v. State](#), 145 Tenn. 544, 238 S.W. 588, 20 A.L.R. 639 (1922).
4 Tenn.—[Hughes v. State](#), 145 Tenn. 544, 238 S.W. 588, 20 A.L.R. 639 (1922).
5 La.—[State v. Citizen](#), 898 So. 2d 325 (La. 2005).
Mo.—[State ex rel. Tompras v. Board of Election Com'r's of St. Louis County](#), 136 S.W.3d 65 (Mo. 2004).
R.I.—[Bayview Towing, Inc. v. Stevenson](#), 676 A.2d 325 (R.I. 1996) (abrogated on other grounds by, [Rivera v. Employees' Retirement System of Rhode Island](#), 70 A.3d 905 (R.I. 2013)).
6 Mo.—[St. Louis County v. Prestige Travel, Inc.](#), 344 S.W.3d 708 (Mo. 2011).

7 U.S.—[Nashville, C. & St. L. Ry. v. Wallace](#), 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191 (1933).

Ga.—[Cooper v. State](#), 277 Ga. 282, 587 S.E.2d 605 (2003).

Ill.—[Redmond v. Novak](#), 86 Ill. 2d 374, 55 Ill. Dec. 933, 427 N.E.2d 53 (1981).

Iowa—[State v. Vick](#), 205 N.W.2d 727 (Iowa 1973).

La.—[Johnson v. Welsh](#), 334 So. 2d 395 (La. 1976).

Nature of discrimination

A party challenging a tax statute on the ground of discrimination must initially delineate the nature of the discrimination and the classes of persons affected.

Vt.—[Andrews v. Lathrop](#), 132 Vt. 256, 315 A.2d 860 (1974).

Implied consent statute

A defendant in a prosecution for driving under the influence of cocaine adequately raised a constitutional challenge to an implied consent statute by alleging that to the extent the statute allowed the State to require a person to consent to a search of his or her bodily substances without probable cause, it was unconstitutional under the state and federal constitutions.

Ga.—[Cooper v. State](#), 277 Ga. 282, 587 S.E.2d 605 (2003).

8 U.S.—[Carr Staley, Inc. v. U.S.](#), 496 F.2d 1366 (5th Cir. 1974).

Colo.—[People v. One 1967 Pontiac \(GTO\) Colo. License Plate UY-1043, Vehicle I.D. No. 242177Z117130, 678 P.2d 1016](#) (Colo. 1984).

Ill.—[Janson v. Illinois Pollution Control Bd.](#), 69 Ill. App. 3d 324, 25 Ill. Dec. 748, 387 N.E.2d 404 (3d Dist. 1979).

N.M.—[State v. Hines](#), 1967-NMSC-237, 78 N.M. 471, 432 P.2d 827 (1967).

9 U.S.—[Borden's Farm Products Co. v. Baldwin](#), 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934).

Ill.—[Janson v. Illinois Pollution Control Bd.](#), 69 Ill. App. 3d 324, 25 Ill. Dec. 748, 387 N.E.2d 404 (3d Dist. 1979).

N.D.—[Overboe v. Farm Credit Services of Fargo](#), 2001 ND 58, 623 N.W.2d 372 (N.D. 2001).

R.I.—[Perrotti v. Solomon](#), 657 A.2d 1045 (R.I. 1995).

Commitment of sexually dangerous person

Unsupported allegations of an individual adjudicated as a sexually dangerous person and civilly committed, to the effect that his commitment had "become that of an inmate," rather than that of a civil detainee, were insufficiently specific to permit a court to ascertain whether any alleged differences in treatment were supported by a rational government interest as required for judicial review of the individual's equal protection claim.

Mass.—[In re Dutil](#), 437 Mass. 9, 768 N.E.2d 1055 (2002).

10 Conn.—[Ramos v. Town of Vernon](#), 254 Conn. 799, 761 A.2d 705 (2000).

16 C.J.S. Constitutional Law § 235

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

4. Manner of Raising Issue

§ 235. Time for raising question

[Topic Summary](#) | [References](#) | [Correlation Table](#)

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Subject to some qualifications, it is the general rule that questions with respect to the constitutionality of an act must be raised at the earliest opportunity consistent with good pleading and orderly procedure.

While, when considering a question with respect to the constitutionality of an act, it is the duty of the court to exercise some discretion in determining the time when it must be presented,¹ it is the general rule, subject apparently to some qualifications,² that the question must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered waived.³ Ignorance of pertinent facts is not an excuse for a failure to assert constitutional rights at the proper time.⁴ The foregoing rules apply in criminal cases as well as in civil ones.⁵

A constitutional objection not raised by the pleadings ordinarily may not be raised later at trial⁶ or thereafter,⁷ such as on a motion for a new trial⁸ or a motion for a rehearing.⁹

When reviewing a state judgment, the U.S. Supreme Court will not reach federal constitutional claims that were not raised in state court.¹⁰

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Footnotes

- 1 U.S.—[Yakus v. U. S.](#), 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).
Cal.—[Cucamonga County Water Dist. v. Southwest Water Co.](#), 22 Cal. App. 3d 245, 99 Cal. Rptr. 557 (4th Dist. 1971).
Kan.—[Owen v. Mutual Ben. Health & Acc. Ass'n](#), 171 Kan. 457, 233 P.2d 706 (1951).
Wis.—[Wendlandt v. Industrial Commission](#), 256 Wis. 62, 39 N.W.2d 854 (1949).
- 2 Kan.—[Owen v. Mutual Ben. Health & Acc. Ass'n](#), 171 Kan. 457, 233 P.2d 706 (1951).
Challenge to subpoena
A constitutional issue concerning a subpoena issued by a legislative committee may be raised by a citizen at that point in the proceedings where his or her constitutional rights are affected.
Pa.—[Camiel v. Select Committee on State Contract Practices of House of Representatives](#), 15 Pa. Commw. 60, 324 A.2d 862 (1974).
Substantial evidence of waiver required
Mont.—[Fitzpatrick v. Crist](#), 165 Mont. 382, 528 P.2d 1322 (1974).
U.S.—[Curtis Pub. Co. v. Butts](#), 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).
Ala.—[Senn v. State](#), 43 Ala. App. 323, 189 So. 2d 870 (1966).
Fla.—[City of Treasure Island v. Strong](#), 215 So. 2d 473 (Fla. 1968).
Iowa—[State v. Munz](#), 355 N.W.2d 576 (Iowa 1984).
Kan.—[City of Junction City v. Mevis](#), 226 Kan. 526, 601 P.2d 1145 (1979).
Mo.—[St. Louis County v. Prestige Travel, Inc.](#), 344 S.W.3d 708 (Mo. 2011).
Mont.—[Matter of Authority to Conduct Sav. and Loan Activities in State of Mont. by Gate City Sav. and Loan Ass'n of Fargo](#), North Dakota, 182 Mont. 361, 597 P.2d 84 (1979).
Neb.—[Zoiman v. Landsman](#), 192 Neb. 561, 223 N.W.2d 49 (1974).
N.C.—[Porter v. Suburban Sanitation Service, Inc.](#), 283 N.C. 479, 196 S.E.2d 760 (1973).
Ohio—[State v. Lancaster](#), 25 Ohio St. 2d 83, 54 Ohio Op. 2d 222, 267 N.E.2d 291 (1971).
Tex.—[Boulware v. State](#), 542 S.W.2d 677 (Tex. Crim. App. 1976).
As to estoppel or waiver to raise a constitutional issue, generally, see § 191.
As to the need to raise the issue in the trial court, see § 229.
As to appellate consideration of constitutional questions not raised in the trial court, see C.J.S., Appeal and Error § 300.
- 4 Kan.—[Owen v. Mutual Ben. Health & Acc. Ass'n](#), 171 Kan. 457, 233 P.2d 706 (1951).
5 U.S.—[Yakus v. U. S.](#), 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).
Ark.—[Parham v. State](#), 262 Ark. 241, 555 S.W.2d 943 (1977).
Ariz.—[State v. Lee](#), 25 Ariz. App. 220, 542 P.2d 413 (Div. 1 1975).
Ga.—[Ferguson v. Caldwell](#), 233 Ga. 887, 213 S.E.2d 855 (1975).
Iowa—[State v. Allen](#), 304 N.W.2d 203 (Iowa 1981).
Neb.—[Truman v. Hann](#), 154 Neb. 501, 48 N.W.2d 418 (1951).
Okla.—[Application of Poston](#), 1955 OK CR 39, 281 P.2d 776 (Okla. Crim. App. 1955).
Or.—[State v. Gardner](#), 16 Or. App. 464, 518 P.2d 1341 (1974).
Tenn.—[State ex rel. Carlson v. State](#), 219 Tenn. 80, 407 S.W.2d 165 (1966).
Tex.—[Valadez v. State](#), 408 S.W.2d 109 (Tex. Crim. App. 1966).
As to waiver of the right to raise constitutional questions in criminal proceedings, generally, see § 195.
- 6 Ga.—[Grant v. McKiernan](#), 82 Ga. App. 82, 60 S.E.2d 794 (1950).
Kan.—[Owen v. Mutual Ben. Health & Acc. Ass'n](#), 171 Kan. 457, 233 P.2d 706 (1951).
Mo.—[Nemours v. City of Clayton](#), 351 Mo. 317, 172 S.W.2d 937 (1943).
- 7 Ala.—[Board of Educ. of Choctaw County v. Kennedy](#), 256 Ala. 478, 55 So. 2d 511 (1951).
Mo.—[State ex rel. Dengel v. Hartmann](#), 339 Mo. 200, 96 S.W.2d 329 (1936).

R.I.—[State v. Hartman](#), 65 R.I. 174, 14 A.2d 18 (1940).

Contempt proceedings

Mo.—[Hopkins v. Hopkins](#), 626 S.W.2d 389 (Mo. Ct. App. E.D. 1981).

8 Ga.—[Cambron v. Canal Ins. Co.](#), 246 Ga. 147, 269 S.E.2d 426 (1980).

9 U.S.—[Stembridge v. State of Ga.](#), 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

10 U.S.—[Bankers Life and Cas. Co. v. Crenshaw](#), 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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4. Manner of Raising Issue

§ 236. Method of raising question

[Topic Summary](#) | [References](#) | [Correlation Table](#)

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A question as to the constitutionality of a statute may be raised by various pleadings and motions.

As limited by the rules regarding the necessity of detailing the objection and raising it at the proper time,¹ a question as to the constitutionality of a statute may be raised by various procedural means, including an answer and affirmative defense,² a motion to dismiss,³ or a motion for summary judgment.⁴ However, a motion to dismiss is not the proper method where the application of the statute in the particular case is the subject of the inquiry.⁵ A party mounting a constitutional challenge to the validity of a statute must provide an adequate factual record to meet its burden of demonstrating the statute's adverse impact on some protected interest, and not merely under some hypothetical set of facts,⁶ and because that record should be fully developed, the question should not be raised as an afterthought in a posttrial motion.⁷

Where an amended complaint is considered complete in itself, and supersedes the original, the failure to reallege a constitutional question in the amended complaint waives it.⁸

A request in a footnote of an appellate brief that the court consider the constitutionality of a statute is not the proper way to raise such an issue.⁹

Criminal cases.

In a criminal prosecution, the constitutionality of a statute may be raised by a plea of not guilty,¹⁰ otherwise in the pleadings,¹¹ by certain types of motions,¹² such as a motion to quash,¹³ a motion to dismiss,¹⁴ or a motion in arrest of judgment,¹⁵ and by objecting to the introduction of evidence.¹⁶ However, it has been held that such a question may not be raised by a motion for a new trial¹⁷ although such a motion is proper where an erroneous instruction was given based on the allegedly unconstitutional statute.¹⁸ It has been stated, however, that a conviction and sentence may not be permitted to stand if, in fact, the statute under which the accused was prosecuted is unconstitutional although its constitutionality was not challenged except in a motion for a new trial.¹⁹

A claim that a statute on which an information, warrant, or indictment was based is, because of some circumstance peculiar to the situation of the accused, unconstitutional is properly triable under a plea of not guilty.²⁰

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Footnotes

1 §§ 231 et seq.

2 Ga.—*Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954).

Tex.—*In re Doe 2*, 19 S.W.3d 278 (Tex. 2000).

Amended answer

N.Y.—*Wickham v. Trapani*, 26 A.D.2d 216, 272 N.Y.S.2d 6 (3d Dep't 1966).

3 Mo.—*Harris v. Bates*, 364 Mo. 1023, 270 S.W.2d 763 (1954).

N.M.—*Vigil v. State*, 1952-NMSC-054, 56 N.M. 411, 244 P.2d 1110 (1952).

4 Wash.—*Hontz v. State*, 105 Wash. 2d 302, 714 P.2d 1176, 30 Ed. Law Rep. 1294 (1986).

5 U.S.—*Cicero v. Olgiati*, 410 F. Supp. 1080, 22 Fed. R. Serv. 2d 230 (S.D. N.Y. 1976); *Guerrero v. Schmidt*, 352 F. Supp. 789 (W.D. Wis. 1973).

6 Conn.—*Bell Atlantic Mobile, Inc. v. Department of Public Utility Control*, 253 Conn. 453, 754 A.2d 128 (2000).

As to the need to take evidence on the constitutional issue, see § 229.

7 Mo.—*Hollis v. Blevins*, 926 S.W.2d 683 (Mo. 1996).

8 Or.—*Worrell v. Department of Revenue*, 299 Or. 444, 703 P.2d 230 (1985).

9 Ohio—*Butler v. Jordan*, 92 Ohio St. 3d 354, 2001-Ohio-204, 750 N.E.2d 554 (2001).

10 Neb.—*State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993).

11 Ga.—*Hardeman v. State*, 272 Ga. 361, 529 S.E.2d 368 (2000).

12 Neb.—*State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974).

Challenge to court rule

Miss.—*Scott v. State*, 310 So. 2d 703 (Miss. 1975).

13 N.C.—*State v. Fredell*, 283 N.C. 242, 195 S.E.2d 300 (1973).

Wis.—*State v. Evjue*, 253 Wis. 146, 33 N.W.2d 305, 13 A.L.R.2d 1201 (1948).

Facial challenge

To bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash the criminal complaint, but a motion to quash is not appropriate when attacking the constitutionality of a statute as applied.

Neb.—*State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

14 Ind.—*Marchand v. State*, 435 N.E.2d 284 (Ind. Ct. App. 1982).

- Iowa—[State v. Munz](#), 355 N.W.2d 576 (Iowa 1984).
15 Ind.—[Knapp v. State](#), 203 Ind. 610, 181 N.E. 517 (1932).
16 Ga.—[Hardeman v. State](#), 272 Ga. 361, 529 S.E.2d 368 (2000).
17 Ill.—[People v. Eisen](#), 357 Ill. 105, 191 N.E. 219 (1934).
Ind.—[Knapp v. State](#), 203 Ind. 610, 181 N.E. 517 (1932).
Mo.—[State v. Merchant](#), 119 S.W.2d 303 (Mo. 1938).
- To challenge facial invalidity of statute**
- Neb.—[State v. Carpenter](#), 250 Neb. 427, 551 N.W.2d 518 (1996).
18 Ill.—[People v. Eisen](#), 357 Ill. 105, 191 N.E. 219 (1934).
19 Ark.—[Smith v. State](#), 207 Ark. 104, 179 S.W.2d 185 (1944).
20 Neb.—[State v. Saulsbury](#), 243 Neb. 227, 498 N.W.2d 338 (1993).
N.C.—[State v. Underwood](#), 283 N.C. 154, 195 S.E.2d 489 (1973).
Wis.—[State v. Evjue](#), 253 Wis. 146, 33 N.W.2d 305, 13 A.L.R.2d 1201 (1948).

16 C.J.S. Constitutional Law § 237

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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5. Scope of Inquiry

§ 237. Scope of court's inquiry into constitutionality of statute, generally

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The constitutionality of a statute is a question of law for the court, and acquiescence in a statute's constitutionality is not conclusive.

Whether a particular statute is constitutional is a matter of law for the court's determination.¹ The court must interpret the language of the constitutional provision at issue,² applying established principles of constitutional construction,³ and thoroughly examine all relevant facts.⁴ A court is not bound by admissions, stipulations, or allegations that are not controverted as to the unconstitutionality of the statute or as to the facts on which the attack is based.⁵ Acquiescence in, or practical construction of, a statute as constitutional is not conclusive but will be given consideration and weight by the courts.⁶ A court must also independently determine what level of scrutiny it should apply when determining an equal protection challenge.⁷

When assessing the constitutionality of a statute under a state constitution, a court should examine its textual language, the legislative history, preexisting state law, structural differences between the federal and state constitutions, matters of particular state interest, state traditions, and public attitudes.⁸

A constitutional challenge raised under one theory cannot be supported by decisional law based purely on another provision.⁹

Government involvement.

While even a longstanding history of related federal action does not demonstrate a statute's constitutionality, a history of involvement nonetheless can be helpful in reviewing the substance of a congressional statutory scheme and, in particular, the reasonableness of the relation between the new statute and preexisting federal interests.¹⁰

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Footnotes

- 1 Minn.—[In re Guardianship, Conservatorship of Durand](#), 859 N.W.2d 780 (Minn. 2015).
Neb.—[Shepard v. Houston](#), 289 Neb. 399, 855 N.W.2d 559 (2014).
Pa.—[Markovsky v. Crown Cork & Seal Co.](#), 2014 PA Super 282, 107 A.3d 749 (2014).
Wash.—[In re McNeil](#), 181 Wash. 2d 582, 334 P.3d 548 (2014).
Wyo.—[Kordus v. Montes](#), 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).
- Equal protection case**
Identifying the applicable level of scrutiny in an equal protection case is a question of law; likewise, identifying the nature of the challenger's interest and assessing the importance of the governmental interest and the fit between that interest and the means chosen to advance it present questions of law.
Alaska—[State v. Schmidt](#), 323 P.3d 647 (Alaska 2014).
- 2 La.—[Louisiana Mun. Ass'n v. State](#), 773 So. 2d 663 (La. 2000).
- 3 Ark.—[Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.](#), 353 Ark. 701, 120 S.W.3d 525 (2003).
- 4 N.C.—[Anderson v. Assimos](#), 356 N.C. 415, 572 S.E.2d 101 (2002).
- 5 Ill.—[National Bank of Colchester v. Murphy](#), 384 Ill. 61, 50 N.E.2d 748 (1943).
Miss.—[Chassanoil v. City of Greenwood](#), 166 Miss. 848, 148 So. 781 (1933), aff'd, 291 U.S. 584, 54 S. Ct. 541, 78 L. Ed. 1004 (1934).
Mo.—[State ex rel. Jacobsmeyer v. Thatcher](#), 338 Mo. 622, 92 S.W.2d 640 (1936).
N.Y.—[City of Rye v. Metropolitan Transp. Authority](#), 24 N.Y.2d 627, 301 N.Y.S.2d 569, 249 N.E.2d 429 (1969).
Wyo.—[Ziegler v. Pickett](#), 46 Wyo. 283, 25 P.2d 391 (1933).
- 6 U.S.—[Williams v. Illinois](#), 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).
Conn.—[Legat v. Adorno](#), 138 Conn. 134, 83 A.2d 185 (1951).
W. Va.—[Elite Laundry Co. v. Dunn](#), 126 W. Va. 858, 30 S.E.2d 454 (1944).
As to the effect of long acquiescence to the construction of constitutional provisions, see § 109.
A court's power to decline to review a statute on the basis of long acquiescence in its constitutionality is discussed in § 206.
- 7 As to a valid construction acquired through long acquiescence, see § 247.
Ohio—[State v. Thompson](#), 95 Ohio St. 3d 264, 2002-Ohio-2124, 767 N.E.2d 251 (2002).
- 8 N.J.—[State v. Muhammad](#), 145 N.J. 23, 678 A.2d 164 (1996).
- 9 Ill.—[People v. Patterson](#), 2014 IL 115102, 388 Ill. Dec. 834, 25 N.E.3d 526 (Ill. 2014).
- 10 U.S.—[U.S. v. Comstock](#), 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878, 65 A.L.R. Fed. 2d 667 (2010).

16 C.J.S. Constitutional Law § 238

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

5. Scope of Inquiry

§ 238. Construction of statute

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  969, 981, 984

A court must construe a statute to determine whether it comes within the legislative power and constitutional requirements.

In determining the constitutionality of statutes, a court must first construe its meaning by applying the ordinary principles of construction¹ and then decide whether the enactment of the statute, as thus construed, is within the scope of the legislative power and comports with constitutional requirements.²

Prior judicial construction of the statute at issue³ and predecessors reenacted by it⁴ may be considered. In evaluating a facial challenge to a state law, a federal court must consider any limiting construction that the State has placed on that law.⁵ The language of a statute may be limited by instructions,⁶ uniform practice,⁷ and administrative interpretations,⁸ and a court should consider reasonable constructions by the agency charged with implementing the statute.⁹ However, if a statute is unambiguous, an agency may not insulate it from constitutional attack by adopting a new interpretation that is not supported by the statutory language.¹⁰ Thus, an agency may not cure an unlawful delegation of legislative power by adopting a limiting construction of

the statute.¹¹ The interpretation placed on a state statute by that state's attorney general need not be given controlling weight where those views were apparently based on an incorrect legal standard and are not binding on state courts.¹² Furthermore, when the act does not have an established construction, the determination must be based on its terms.¹³

In the course of the inquiry, the court will consider the entire statute with all its provisions,¹⁴ considering its effect as a whole,¹⁵ and its constitutionality will be considered with reference to all the provisions of the constitution.¹⁶ Additionally, courts do not address the constitutionality of statutes in isolation but construe the whole statute in light of a strong presumption of a statute's validity.¹⁷ Among other things, a court should give due regard to the facts and conditions existing at the time of enactment of the statute¹⁸ although this rule is not necessarily followed where offending public practices are involved, such as racial segregation in schools.¹⁹ The enactment should be considered in its legislative setting,²⁰ as well as in the historical context in which the enactment took place.²¹ While the enactment of similar statutes by other jurisdictions has been considered by some courts,²² the extent of enactment of similar statutes in other states and the approval or disapproval of the policy behind those statutes in court opinions are immaterial.²³

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Footnotes

- ¹ Ariz.—[State v. Thompson](#), 204 Ariz. 471, 65 P.3d 420 (2003).
- ² Ark.—[Cato v. Craighead County Circuit Court](#), 2009 Ark. 334, 322 S.W.3d 484 (2009).
- ³ La.—[State v. Muschkat](#), 706 So. 2d 429 (La. 1998).
- ⁴ U.S.—[U.S. v. Darby](#), 312 U.S. 100, 312 U.S. 657, 61 S. Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430 (1941).
- ⁵ Ill.—[People v. Alexander](#), 204 Ill. 2d 472, 274 Ill. Dec. 414, 791 N.E.2d 506 (2003).
- ⁶ Iowa—[Goreham v. Des Moines Metropolitan Area Solid Waste Agency](#), 179 N.W.2d 449 (Iowa 1970).
- ⁷ Mass.—[Bowe v. Secretary of the Com.](#), 320 Mass. 230, 69 N.E.2d 115, 167 A.L.R. 1447 (1946).
- ⁸ Minn.—[Dayton Co. v. Carpet, Linoleum and Resilient Floor Decorators' Union, Local No. 596, AFL](#), 229 Minn. 87, 39 N.W.2d 183 (1949).
- ⁹ Miss.—[City of Belmont v. Mississippi State Tax Com'n](#), 860 So. 2d 289 (Miss. 2003).
- ¹⁰ Mont.—[Thompson v. Tobacco Root Co-op. State Grazing Dist.](#), 121 Mont. 445, 193 P.2d 811 (1948).
- ¹¹ N.H.—[State v. Frost](#), 91 N.H. 229, 17 A.2d 441, 132 A.L.R. 528 (1941).
- ¹² N.C.—[Adams v. North Carolina Dept. of Natural and Economic Resources](#), 295 N.C. 683, 249 S.E.2d 402 (1978).
- ¹³ R.I.—[Morrison v. Lamarre](#), 75 R.I. 176, 65 A.2d 217 (1949).
- ¹⁴ Tex.—[Duncan v. Gabler](#), 147 Tex. 229, 215 S.W.2d 155 (1948).
- ¹⁵ Wash.—[State v. Cashaw](#), 4 Wash. App. 243, 480 P.2d 528 (Div. 1 1971).
- ¹⁶ U.S.—[City of Lakewood v. Plain Dealer Pub. Co.](#), 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988); [Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.](#), 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).
- ¹⁷ Mass.—[Com. v. A Juvenile](#), 368 Mass. 580, 334 N.E.2d 617 (1975).
- ¹⁸ Or.—[State v. Ausmus](#), 336 Or. 493, 85 P.3d 864 (2003).
- ¹⁹ Ga.—[Georgia Franchise Practices Commission v. Massey-Ferguson, Inc.](#), 244 Ga. 800, 262 S.E.2d 106 (1979).
- ²⁰ U.S.—[Ward v. Rock Against Racism](#), 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).
- ²¹ As to a limiting construction by the court to save the statute's constitutionality, see § 247.
- ²² Tenn.—[State v. Burkhart](#), 58 S.W.3d 694 (Tenn. 2001).
- ²³ U.S.—[City of Lakewood v. Plain Dealer Pub. Co.](#), 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).
- ²⁴ U.S.—[Ward v. Rock Against Racism](#), 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).
- ²⁵ Tex.—[FM Properties Operating Co. v. City of Austin](#), 22 S.W.3d 868 (Tex. 2000).

- 10 Vt.—[Martin v. State, Agency of Transp. Dept. of Motor Vehicles, 175 Vt. 80, 2003 VT 14, 819 A.2d 742 \(2003\)](#).
- 11 U.S.—[Whitman v. American Trucking Associations, 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 \(2001\)](#).
- 12 U.S.—[Stenberg v. Carhart, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 \(2000\)](#).
- 13 Ill.—[Scofield v. Board of Ed. of Community Consol. School Dist. No. 181, 411 Ill. 11, 103 N.E.2d 640 \(1952\)](#).
- 14 Ala.—[Frahn v. Greyling Realization Corporation, 239 Ala. 580, 195 So. 758 \(1940\)](#).
- Fla.—[Florida Dry Cleaning and Laundry Bd. v. Everglades Laundry, 137 Fla. 290, 188 So. 380 \(1939\)](#).
- Ga.—[Franklin v. Harper, 205 Ga. 779, 55 S.E.2d 221 \(1949\)](#).
- Ill.—[People ex rel. Swartzchild & Co. v. Carter, 376 Ill. 590, 35 N.E.2d 64 \(1941\)](#).
- Ind.—[Ulrich v. Beatty, 139 Ind. App. 174, 216 N.E.2d 737 \(1966\)](#).
- N.J.—[Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152, 365 A.2d 1 \(Ch. Div. 1976\)](#), judgment aff'd, 156 N.J. Super. 513, 384 A.2d 176 (App. Div. 1978).
- N.C.—[State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668, 5 A.L.R.4th 700 \(1979\)](#).
- 16 Colo.—[Champlin Refining Co. v. Cruse, 115 Colo. 329, 173 P.2d 213 \(1946\)](#).
- Ill.—[People ex rel. Bernat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 \(1950\)](#).
- Ind.—[Hanley v. State, 234 Ind. 326, 123 N.E.2d 452 \(1954\)](#).
- N.C.—[State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668, 5 A.L.R.4th 700 \(1979\)](#).
- Oklahoma.—[Dobbs v. Board of County Com'r's of Oklahoma County, 1953 OK 159, 208 Okla. 514, 257 P.2d 802 \(1953\)](#).
- S.C.—[Scroggie v. Bates, 213 S.C. 141, 48 S.E.2d 634 \(1948\)](#).
- Va.—[City of Newport News v. Elizabeth City County, 189 Va. 825, 55 S.E.2d 56 \(1949\)](#).
- 17 Mo.—[Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685 \(Mo. 2006\)](#).
- As to the presumption of validity of statutes, see §§ 249, 250.
- Cal.—[Mulkey v. Reitman, 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 \(1966\)](#), judgment aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).
- Ga.—[Christian v. Moreland, 203 Ga. 20, 45 S.E.2d 201 \(1947\)](#).
- La.—[Martin v. Louisiana Stadium and Exposition Dist., 349 So. 2d 349 \(La. Ct. App. 4th Cir. 1977\)](#).
- N.D.—[Ferch v. Housing Authority of Cass County, 79 N.D. 764, 59 N.W.2d 849 \(1953\)](#).
- Business practices**
- Minn.—[State v. Lanesboro Produce & Hatchery Co., 221 Minn. 246, 21 N.W.2d 792, 163 A.L.R. 1108 \(1946\)](#).
- 19 U.S.—[Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180 \(1954\)](#), supplemented, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955).
- 20 U.S.—[Kotch v. Board of River Port Pilot Com'r's for Port of New Orleans, 330 U.S. 552, 67 S. Ct. 910, 91 L. Ed. 1093 \(1947\)](#).
- Ariz.—[Roberts v. Spray, 71 Ariz. 60, 223 P.2d 808 \(1950\)](#).
- Cal.—[Brown v. Merlo, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P.2d 212, 66 A.L.R.3d 505 \(1973\)](#).
- Fla.—[State v. Barquet, 262 So. 2d 431 \(Fla. 1972\)](#).
- Kan.—[Estate of Baker, 222 Kan. 127, 563 P.2d 431 \(1977\)](#).
- Mo.—[State ex rel. Oliver v. Hunt, 247 S.W.2d 969 \(Mo. 1952\)](#).
- Wash.—[Jenkins v. State, 85 Wash. 2d 883, 540 P.2d 1363 \(1975\)](#).
- As to consideration of the legislative history, see § 245.
- Contemporaneous statute**
- Wyo.—[May v. City of Laramie, 58 Wyo. 240, 131 P.2d 300 \(1942\)](#).
- 21 U.S.—[State of S.C. v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 \(1966\)](#) (abrogated on other grounds by, [Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 186 L. Ed. 2d 651 \(2013\)](#)).
- Cal.—[Mulkey v. Reitman, 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 \(1966\)](#), judgment aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).
- History of Sunday closing laws**

- U.S.—[McGowan v. State of Md.](#), 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), for additional opinion, see, [366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 \(1961\)](#).
- 22 Ariz.—[American Federation of Labor v. American Sash & Door Co.](#), 67 Ariz. 20, 189 P.2d 912 (1948), judgment aff'd, [335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A.L.R.2d 481 \(1949\)](#).
- Cal.—[Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.](#), 11 Cal. 2d 634, 82 P.2d 3, 118 A.L.R. 486 (1938).
- 23 U.S.—[Adkins v. Children's Hospital of the District of Columbia](#), 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A.L.R. 1238 (1923) (overruled in part on other grounds by, [West Coast Hotel Co. v. Parrish](#), 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937)).

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16 C.J.S. Constitutional Law § 239

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

5. Scope of Inquiry

§ 239. Legislative authority to enact

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  969, 981, 984

Judicial inquiry into the constitutionality of a statute is generally limited to whether it is within legislative authority and does not otherwise violate a specific constitutional provision.

If a statute is within the reach of legislative power and does not violate some specific constitutional provision, a court's inquiry ends.¹ A court does not evaluate the merits of the legislature's economic or policy choices² nor inquire into the wisdom or practicability of the legislation.³

When reviewing the constitutionality of a federal statute, courts must accord substantial deference to the predictive judgment of Congress, especially in areas involving judgments concerning regulatory schemes of inherent complexity, and the Supreme Court's sole obligation is to assure that Congress has drawn reasonable inferences based on substantial evidence.⁴

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Footnotes

- 1 U.S.—[Katzenbach v. McClung](#), 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964).
Mass.—[Pielech v. Massasoit Greyhound, Inc.](#), 441 Mass. 188, 804 N.E.2d 894 (2004).
Wis.—[In re Commitment of Dennis H.](#), 2002 WI 104, 255 Wis. 2d 359, 647 N.W.2d 851 (2002).
- 2 Wis.—[In re Commitment of Dennis H.](#), 2002 WI 104, 255 Wis. 2d 359, 647 N.W.2d 851 (2002).
- Alternatives; benefit to private interests**
Once it has been found that a legislature has acted on a subject within its powers and in a manner related to an intended end, it is irrelevant either that other or alternative means of achieving the same end are available or that one of effects of the enactment may be to benefit private as well as public interests.
- N.Y.—[Loreto v. Teleprompter Manhattan CATV Corp.](#), 53 N.Y.2d 124, 440 N.Y.S.2d 843, 423 N.E.2d 320 (1981), judgment rev'd on other grounds, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).
- 3 Mass.—[Pielech v. Massasoit Greyhound, Inc.](#), 441 Mass. 188, 804 N.E.2d 894 (2004).
Okla.—[Grimes v. City of Oklahoma City](#), 49 P.3d 719, 167 Ed. Law Rep. 441 (Okla. 2002), as corrected, (July 8, 2002).
N.J.—[Caviglia v. Royal Tours of America](#), 178 N.J. 460, 842 A.2d 125 (2004).
N.M.—[State ex rel. New Mexico Voices for Children, Inc. v. Denko](#), 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458 (2004).
- 4 U.S.—[Turner Broadcasting System, Inc. v. F.C.C.](#), 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

5. Scope of Inquiry

§ 240. Form or object of statute

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  969, 981, 984

The actual object of a statute, rather than its form or declared purposes, is considered when determining if it is constitutional.

A court must generally disregard the form of the enactment being challenged and look to its substance.¹ Thus, while declarations of object, purpose, or policy contained in the enactment² and administrative interpretations and practices³ are to be carefully considered and given due weight, they are not determinative, and the controlling factors are the real object and purpose of the legislation.⁴ For instance, when considering a vagueness challenge to a statute, a court considers not only the language used but also the legislative objective and the problem the statute was designed to remedy.⁵

In ascertaining the real object and purpose of the statute at issue, a court should ascertain the legislative intent.⁶ As long as any of the possible purposes within the scope of the legislative power may be reasonably accomplished, a court does not need to determine the precise object of the statute,⁷ or even know the precise reasons for the legislation,⁸ to hold the statute constitutional. It is not a court's role to discover the actual basis for the legislation but merely whether there is any rational basis

for finding that the legislation is not the product of an arbitrary and capricious purpose, and if the court determines that any rational basis exists, the statute will withstand a constitutional challenge.⁹ A legislative finding, while not conclusive on the court on the question of the constitutionality of a statute, is very persuasive¹⁰ and in some instances is entitled to great weight.¹¹

In a doubtful case, the declaration of an emergency in the enactment may be entitled to great weight.¹²

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Footnotes

- 1 U.S.—[American Oil Co. v. Neill](#), 380 U.S. 451, 85 S. Ct. 1130, 14 L. Ed. 2d 1 (1965).
 Cal.—[In re Rodriguez](#), 14 Cal. 3d 639, 122 Cal. Rptr. 552, 537 P.2d 384 (1975).
 Ind.—[Protsman v. Jefferson-Craig Consol. School Corp. of Switzerland County](#), 231 Ind. 527, 109 N.E.2d 889 (1953).
 Ky.—[Com. v. O'Harrah](#), 262 S.W.2d 385 (Ky. 1953).
 Tenn.—[Estrin v. Moss](#), 221 Tenn. 657, 430 S.W.2d 345 (1968).
- 2 U.S.—[Chesbro v. Los Angeles County Flood Control Dist.](#), 306 U.S. 459, 59 S. Ct. 622, 83 L. Ed. 921 (1939).
 Del.—[Wilmington Parking Authority v. Ranken](#), 34 Del. Ch. 439, 105 A.2d 614 (1954).
 Ga.—[Cox v. General Elec. Co.](#), 211 Ga. 286, 85 S.E.2d 514 (1955).
 Ill.—[People ex rel. Gutknecht v. City of Chicago](#), 3 Ill. 2d 539, 121 N.E.2d 791 (1954).
 N.H.—[In re Opinion of the Justices](#), 99 N.H. 528, 114 A.2d 514 (1955).
 W. Va.—[Weekley v. Sims](#), 139 W. Va. 263, 79 S.E.2d 847 (1954).
 Wis.—[David Jeffrey Co. v. City of Milwaukee](#), 267 Wis. 559, 66 N.W.2d 362 (1954).
- Purpose**
 Just as the inevitable effect of a statute on its face may render it unconstitutional, a statute's stated purposes may also be considered.
 U.S.—[Sorrell v. IMS Health Inc.](#), 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).
- 3 U.S.—[Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.](#), 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).
 Ga.—[Fulton County v. Holland](#), 71 Ga. App. 455, 31 S.E.2d 202 (1944).
- 4 U.S.—[Reitman v. Mulkey](#), 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).
 Cal.—[Castro v. State of California](#), 2 Cal. 3d 223, 85 Cal. Rptr. 20, 466 P.2d 244 (1970).
 Ga.—[Cox v. General Elec. Co.](#), 211 Ga. 286, 85 S.E.2d 514 (1955).
 N.J.—[Garcia v. Morales](#), 47 N.J. 269, 220 A.2d 198 (1966).
 Wis.—[WKBH Television, Inc. v. Wisconsin Dept. of Revenue](#), 75 Wis. 2d 557, 250 N.W.2d 290 (1977).
- 5 Ill.—[People v. Greco](#), 204 Ill. 2d 400, 274 Ill. Dec. 73, 790 N.E.2d 846 (2003).
- 6 Cal.—[Mulkey v. Reitman](#), 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 (1966), judgment aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).
 Tex.—[Smith v. State](#), 158 Tex. Crim. 410, 256 S.W.2d 109 (1953).
 As to the court reviewing the legislative history, see § 245.
- 7 Mont.—[State v. Safeway Stores](#), 106 Mont. 182, 76 P.2d 81 (1938).
- 8 U.S.—[Armour & Co. v. State of North Dakota](#), 240 U.S. 510, 36 S. Ct. 440, 60 L. Ed. 771 (1916).
- 9 Ark.—[Landers v. Jameson](#), 355 Ark. 163, 132 S.W.3d 741, 16 A.L.R.6th 851 (2003).
 As to rational basis test, see § 1279.
- 10 Fla.—[Higbee v. Housing Authority of Jacksonville](#), 143 Fla. 560, 197 So. 479 (1940).
 N.C.—[Brumley v. Baxter](#), 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945).
 Wis.—[City of West Allis v. Milwaukee County](#), 39 Wis. 2d 356, 159 N.W.2d 36 (1968).
- 11 Md.—[Washington Suburban Sanitary Commission v. Buckley](#), 197 Md. 203, 78 A.2d 638 (1951).
 Miss.—[Wilson Banking Co. Liquidating Corporation v. Colvard](#), 172 Miss. 804, 161 So. 123 (1935).

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16 C.J.S. Constitutional Law § 241

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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5. Scope of Inquiry

§ 241. Actions authorized by statute

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  969, 981, 984

The constitutionality of a statute is tested by what the act authorizes and in connection with actual facts.

Generally, the constitutionality of a statute must be tested not by what has been done under it but by what it authorizes.¹ However, the test of constitutionality is with reference to actual facts,² and a court will not anticipate prospective conditions that may never arise, in order to declare a law unconstitutional.³ The anticipated impact of a statute or regulation that is the subject of a facial constitutional challenge is generally not an appropriate basis on which to invalidate it.⁴ However, a vague attempt to control subversive activities will not be sustained on the basis that it would not be applied in certain postulated cases.⁵

A statute is not constitutionally invalid because it might have gone farther than it did.⁶

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Footnotes

- 1 Ariz.—[McKinney v. Aldrich](#), 123 Ariz. 488, 600 P.2d 1120 (Ct. App. Div. 2 1979).
Colo.—[General Outdoor Advertising Co. v. Goodman](#), 128 Colo. 344, 262 P.2d 261 (1953).
Idaho—[State v. Evans](#), 73 Idaho 50, 245 P.2d 788 (1952).
Iowa—[State v. Aldrich](#), 231 N.W.2d 890, 81 A.L.R.3d 1062 (Iowa 1975).
Ky.—[Kentucky Alcoholic Beverage Control Bd. v. Jacobs](#), 269 S.W.2d 189 (Ky. 1954).
La.—[Bahry v. West Ascension Consol. Drainage Dist.](#), 218 La. 1028, 51 So. 2d 614 (1951).
Me.—[Jordan v. Town of Canton](#), 265 A.2d 96 (Me. 1970).
Md.—[Bruce v. Director, Dept. of Chesapeake Bay Affairs](#), 261 Md. 585, 276 A.2d 200 (1971).
Neb.—[State ex rel. Bouc v. School Dist. of City of Lincoln](#), 211 Neb. 731, 320 N.W.2d 472, 4 Ed. Law Rep. 857 (1982).
Or.—[Demers v. Peterson](#), 197 Or. 466, 254 P.2d 213 (1953).
Vt.—[State v. Douglas](#), 117 Vt. 484, 94 A.2d 403 (1953).
Va.—[Infants v. Virginia Housing Development Authority](#), 221 Va. 659, 272 S.E.2d 649 (1980).
- 2 Mass.—[Brest v. Commissioner of Insurance](#), 270 Mass. 7, 169 N.E. 657 (1930).
Mo.—[Chamberlin v. Missouri Elections Commission](#), 540 S.W.2d 876 (Mo. 1976).
- 3 U.S.—[Tilton v. Richardson](#), 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971).
Colo.—[People ex rel. Rogers v. Letford](#), 102 Colo. 284, 79 P.2d 274 (1938).
Ohio—[State ex rel. Herbert v. Ferguson](#), 142 Ohio St. 496, 27 Ohio Op. 415, 52 N.E.2d 980 (1944).
Wyo.—[In re Edelman's Estate](#), 68 Wyo. 30, 228 P.2d 408 (1951).
- 4 **Ignoring public good**
When determining the constitutionality of a statute authorizing state administrative departments to employ attorneys, a court would not assume that the heads of the departments would ignore the public good.
Ky.—[Johnson v. Commonwealth ex rel. Meredith](#), 291 Ky. 829, 165 S.W.2d 820 (1942).
U.S.—[Greenville Women's Clinic v. Bryant](#), 222 F.3d 157 (4th Cir. 2000).
- 5 U.S.—[Keyishian v. Board of Regents of University of State of N. Y.](#), 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).
U.S.—[Ognibene v. Parkes](#), 671 F.3d 174 (2d Cir. 2011).
- 6

16 C.J.S. Constitutional Law § 242

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

5. Scope of Inquiry

§ 242. Operation of statute

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  969, 981, 984

A statute may be unconstitutional as a result of its operation although it should not be invalidated simply because of the manner in which it is executed.

A statute that is not objectionable on its face may be adjudged unconstitutional because of its effect in operation¹ as by its improper application to a permissive subject matter.²

The constitutionality of a statute should not depend on the way in which it is administered by those who are charged with its execution,³ unless it invites subjective or discriminatory enforcement,⁴ although such an exercise of power may be held invalid despite the fact that the statute is lawful on its face.⁵ Administrative implementation of a law may suggest a limiting, constitutional construction.⁶ The U.S. Supreme Court will not uphold an unconstitutional statute merely because the government promised to use it responsibly.⁷

Footnotes

- 1 U.S.—[Sorrell v. IMS Health Inc.](#), 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011); [Boddie v. Connecticut](#), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).
- Ohio—[Cech v. Schultz](#), 132 Ohio St. 353, 8 Ohio Op. 113, 7 N.E.2d 557 (1937).
- Pa.—[Turco Paint & Varnish Co. v. Kalodner](#), 320 Pa. 421, 184 A. 37 (1936).
- Vt.—[Clark v. City of Burlington](#), 101 Vt. 391, 143 A. 677 (1928).
- Wash.—[State v. Dexter](#), 32 Wash. 2d 551, 202 P.2d 906, 13 A.L.R.2d 1081 (1949), judgment aff'd, [338 U.S. 863](#), 70 S. Ct. 147, 94 L. Ed. 529 (1949).
- 2 U.S.—[Metzenbaum v. Federal Energy Regulatory Commission](#), 675 F.2d 1282 (D.C. Cir. 1982).
- Iowa—[State v. Bevins](#), 210 Iowa 1031, 230 N.W. 865 (1930).
- 3 U.S.—[Duke Power Co. v. Greenwood County](#), 91 F.2d 665 (C.C.A. 4th Cir. 1937), decree aff'd by, [302 U.S. 485](#), 58 S. Ct. 306, 82 L. Ed. 381 (1938).
- Conn.—[State v. Coleman](#), 96 Conn. 190, 113 A. 385 (1921).
- 4 Cal.—[Chambers v. Municipal Court](#), 65 Cal. App. 3d 904, 135 Cal. Rptr. 695 (1st Dist. 1977).
- 5 U.S.—[Lovelace v. U.S.](#), 357 F.2d 306 (5th Cir. 1966).
- Ala.—[McElrath Poultry Co., Inc. v. State, Dept. of Revenue](#), 332 So. 2d 383 (Ala. Civ. App. 1976).
- Cal.—[A.B.C. Distributing Co. v. City and County of San Francisco](#), 15 Cal. 3d 566, 125 Cal. Rptr. 465, 542 P.2d 625 (1975).
- Ind.—[Chaffin v. Nicosia](#), 261 Ind. 698, 310 N.E.2d 867 (1974).
- N.D.—[State v. Gamble Skogmo, Inc.](#), 144 N.W.2d 749 (N.D. 1966).
- Utah—[Ellis v. Social Services Dept. of Church of Jesus Christ of Latter-Day Saints](#), 615 P.2d 1250 (Utah 1980).
- W. Va.—[Kolvek v. Napple](#), 158 W. Va. 568, 212 S.E.2d 614 (1975).
- 6 U.S.—[Ward v. Rock Against Racism](#), 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).
- 7 U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

16 C.J.S. Constitutional Law § 243

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

5. Scope of Inquiry

§ 243. Operation of statute—"As applied" and facial challenges

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  969, 981, 984, 1131

An "as applied" challenge is a claim that the operation of a statute is unconstitutional in a particular case while a facial challenge indicates that the statute may rarely or never be constitutionally applied.

When faced with a claim that application of a statute renders it unconstitutional, a court must analyze the statute as applied to the particular case.¹ An "as-applied challenge" concedes that a statute may be facially constitutional or constitutional in many of its applications but contends that it is not so under the particular circumstances of the case.² An as-applied constitutional challenge to a statute is brought during or after a trial on the merits because it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner.³ If an as-applied challenge to the constitutionality of a statute is successful, the statute may not be applied to the challenger but is otherwise enforceable.⁴

In an as-applied challenge to the constitutionality of a statute, the court assesses the merits of the challenge by considering the facts of the particular case in front of the court, not hypothetical facts in other situations.⁵ The U.S. Supreme Court is reluctant to invalidate legislation on the basis of its hypothetical application to situations not before the Court.⁶

A plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been, or is sufficiently likely to be, unconstitutionally applied to him or her.⁷ Specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, the challenger must show that he or she was prevented from speaking while someone espousing another viewpoint was permitted to do so.⁸

A facial challenge to the constitutionality of a statute or regulation, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself.⁹ A successful facial constitutional challenge voids a statute in all contexts for all parties.¹⁰ In federal court, a plaintiff can succeed in a facial challenge to the constitutionality of a law, outside the First Amendment context, only by establishing that no set of circumstances exists under which the law would be valid, i.e., that the law is unconstitutional in all of its applications,¹¹ and a facial challenge must fail where a statute has a plainly legitimate sweep.¹² On a facial challenge to the constitutionality of a law, the court must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases.¹³ Facial challenges to the constitutionality of a law are disfavored for several reasons, including that such challenges often rest on speculation, and that they also run contrary to the fundamental principle of judicial restraint, under which courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.¹⁴ The proper framework to apply in a facial challenge is not to require the challenger to disprove every possible hypothetical situation in which the restriction might be validly applied but rather to apply the appropriate constitutional test to determine whether the challenged restriction is invalid on its face and thus incapable of any valid application.¹⁵

A party who initially challenges a statute in state court is not required to make the showing that no set of circumstances exists under which the statute would be valid,¹⁶ and some courts uphold a facial attack on a statute if it operates unconstitutionally in a large fraction of the cases in which it applies.¹⁷ However, in many states, the determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid,¹⁸ i.e., that the law is unconstitutional in all of its applications.¹⁹ A facial challenge also fails when a statute has a plainly legitimate sweep.²⁰ It has also been stated that a facial constitutional challenge considers only the text of the statute,²¹ not its application to a particular set of circumstances.²²

When there has been no evidentiary hearing and no findings of fact, a constitutional challenge to a statute must be facial.²³

A defendant who fails to demonstrate that a challenged law is unconstitutional as applied to him or her has necessarily failed to state a facial challenge, which requires the defendant to establish that no set of circumstances exists under which the statute would be valid.²⁴ The usual judicial practice is to address an as-applied constitutional challenge to a statute before a facial challenge²⁵ as it generally will be more efficient, decreases the odds that facial attacks will be addressed unnecessarily, and avoids encouraging gratuitous wholesale attacks upon state and federal laws.²⁶

Overbreadth or vagueness analysis involving a violation of First Amendment.

In an overbreadth or vagueness analysis involving a violation of First Amendment rights, a court is not limited to an examination of the application of the statute in the particular case but may consider all possible applications²⁷ and may invalidate the entire statute on its face, not merely as applied.²⁸ On the other hand, unless a challenge involves First Amendment concerns, the determination whether a regulation or statute is void for vagueness, under due process principles, is made on an as-applied basis,²⁹ considering the particular facts of each case.³⁰ Thus, when determining if a statute is void for vagueness, a court will not examine the statute as it might apply to the conduct of persons not before the court,³¹ and it is usually immaterial that the statute is of questionable applicability in foreseeable situations if a contested provision clearly applies to a party's conduct.³² However, the question whether classifications on the basis of age violate the Equal Protection Clause cannot be determined on a person-by-person basis.³³

When a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even if the law has some valid application.³⁴

CUMULATIVE SUPPLEMENT

Cases:

A facial constitutional challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications, and thus, classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy, but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation; surely it would be strange for the same words of the Constitution to bear entirely different meanings depending only on how broad a remedy the plaintiff chooses to seek. [Bucklew v. Precythe](#), 139 S. Ct. 1112 (2019).

An as-applied First Amendment challenge consists of a challenge to a statute's application only, as applied to the party before the court; if an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable. [U.S. Const. Amend. 1. Phelps-Roper v. Ricketts](#), 867 F.3d 883 (8th Cir. 2017).

A plaintiff generally cannot prevail on an as-applied First Amendment challenge to a law without showing that the law has in fact been unconstitutionally applied to her. [U.S. Const. Amend. 1. Phelps-Roper v. Ricketts](#), 867 F.3d 883 (8th Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 Mich.—[Crego v. Coleman](#), 463 Mich. 248, 615 N.W.2d 218 (2000).
- 2 N.H.—[In re Southern New Hampshire Medical Center](#), 164 N.H. 319, 55 A.3d 988 (2012).
- 3 Utah—[Gillmor v. Summit County](#), 2010 UT 69, 246 P.3d 102 (Utah 2010).
- 4 Tex.—[In re D.J.R.](#), 319 S.W.3d 759 (Tex. App. El Paso 2010).
- 5 Tex.—[Ex parte Ragston](#), 402 S.W.3d 472 (Tex. App. Houston 14th Dist. 2013), petition for discretionary review granted, (Aug. 21, 2013) and judgment aff'd, 424 S.W.3d 49 (Tex. Crim. App. 2014).
- 6 U.S.—[Minnesota Majority v. Mansky](#), 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).
- 7 Wis.—[State v. Wood](#), 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63 (2010).
- 8 U.S.—[National Endowment for the Arts v. Finley](#), 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).
- 9 U.S.—[McCullen v. Coakley](#), 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).
- 10 U.S.—[McCullen v. Coakley](#), 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

- 9 U.S.—[Indigo Room, Inc. v. City of Fort Myers](#), 710 F.3d 1294 (11th Cir. 2013).
- Distinction**
- The distinction between facial constitutional challenges and as-applied constitutional challenges goes to the breadth of the remedy employed by the court, not what must be pleaded in a complaint.
- 10 U.S.—[Citizens United v. Federal Election Com'n](#), 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).
- Ill.—[In re Commitment of Walker](#), 2014 IL App (2d) 130372, 385 Ill. Dec. 647, 19 N.E.3d 205 (App. Ct. 2d Dist. 2014).
- 11 U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); [Washington State Grange v. Washington State Republican Party](#), 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).
- Difficult challenge to make**
- A facial challenge to a legislative act is the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the act would be valid.
- U.S.—[Doe v. City of Albuquerque](#), 667 F.3d 1111, 81 Fed. R. Serv. 3d 783 (10th Cir. 2012).
- Operative under some circumstances**
- Facial constitutional challenge to legislative act must establish that no set of circumstances exist under which act would be valid; that challenged provisions might operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid.
- U.S.—[Department of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Com'n](#), 727 F.3d 415 (5th Cir. 2013), reh'g en banc granted, 734 F.3d 1223 (5th Cir. 2013).
- 12 U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); [Crawford v. Marion County Election Bd.](#), 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008); [Washington State Grange v. Washington State Republican Party](#), 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).
- 13 U.S.—[Washington State Grange v. Washington State Republican Party](#), 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).
- R.I.—[Narragansett Indian Tribe v. State](#), 2015 WL 917921 (R.I. 2015).
- 14 U.S.—[Washington State Grange v. Washington State Republican Party](#), 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).
- 15 U.S.—[Doe v. City of Albuquerque](#), 667 F.3d 1111, 81 Fed. R. Serv. 3d 783 (10th Cir. 2012).
- 16 U.S.—[City of Chicago v. Morales](#), 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).
- 17 Ga.—[State v. Jackson](#), 269 Ga. 308, 496 S.E.2d 912 (1998).
- 18 Ark.—[Martin v. Kohls](#), 2014 Ark. 427, 444 S.W.3d 844 (2014).
- Fla.—[Smalley v. Duke Energy Florida, Inc.](#), 154 So. 3d 439 (Fla. 2d DCA 2014).
- Ill.—[Hayashi v. Illinois Dept. of Financial and Professional Regulation](#), 2014 IL 116023, 388 Ill. Dec. 878, 25 N.E.3d 570 (Ill. 2014).
- Ind.—[In re Adoption of K.G.B.](#), 18 N.E.3d 292 (Ind. Ct. App. 2014).
- Miss.—[Crook v. City of Madison](#), 2014 WL 4823656 (Miss. Ct. App. 2014).
- N.H.—[State v. Carter](#), 106 A.3d 1165 (N.H. 2014).
- Neb.—[Thompson v. Heineman](#), 289 Neb. 798, 857 N.W.2d 731 (2015).
- Pa.—[Com. v. Thompson](#), 2014 PA Super 273, 106 A.3d 742 (2014).
- Invalidity in one set of circumstances**
- The invalidity of a statute in one particular set of circumstances is insufficient to prove its facial invalidity.
- Ill.—[City of Chicago v. Alexander](#), 2014 IL App (1st) 122858, 388 Ill. Dec. 354, 24 N.E.3d 262 (App. Ct. 1st Dist. 2014).
- 19 Neb.—[Thompson v. Heineman](#), 289 Neb. 798, 857 N.W.2d 731 (2015).
- Pa.—[Com. v. Thompson](#), 2014 PA Super 273, 106 A.3d 742 (2014).
- Tex.—[King Street Patriots v. Texas Democratic Party](#), 2014 WL 7014378 (Tex. App. Austin 2014).
- 20 Fla.—[Smalley v. Duke Energy Florida, Inc.](#), 154 So. 3d 439 (Fla. 2d DCA 2014).
- Ga.—[Sentinel Offender SVCS., LLC v. Glover](#), 296 Ga. 315, 766 S.E.2d 456 (2014).
- 21 Cal.—[Rubin v. Padilla](#), 233 Cal. App. 4th 1128, 183 Cal. Rptr. 3d 373 (1st Dist. 2015).
- Fla.—[Smalley v. Duke Energy Florida, Inc.](#), 154 So. 3d 439 (Fla. 2d DCA 2014).
- N.M.—[State v. Murillo](#), 2015 WL 270053 (N.M. Ct. App. 2015).
- Tex.—[Gore v. State](#), 451 S.W.3d 182 (Tex. App. Houston 1st Dist. 2014).
- 22 Cal.—[Rubin v. Padilla](#), 233 Cal. App. 4th 1128, 183 Cal. Rptr. 3d 373 (1st Dist. 2015).
- Fla.—[Smalley v. Duke Energy Florida, Inc.](#), 154 So. 3d 439 (Fla. 2d DCA 2014).

Tex.—[Gore v. State](#), 451 S.W.3d 182 (Tex. App. Houston 1st Dist. 2014).

Parties' particular circumstances irrelevant

Ill.—[City of Chicago v. Alexander](#), 2014 IL App (1st) 122858, 388 Ill. Dec. 354, 24 N.E.3d 262 (App. Ct. 1st Dist. 2014).

23 Ill.—[People v. Mosley](#), 2015 IL 115872, 2015 WL 728095 (Ill. 2015).

24 U.S.—[U.S. v. Decastro](#), 682 F.3d 160 (2d Cir. 2012), cert. denied, 133 S. Ct. 838, 184 L. Ed. 2d 665 (2013).

Ill.—[City of Chicago v. Alexander](#), 2014 IL App (1st) 122858, 388 Ill. Dec. 354, 24 N.E.3d 262 (App. Ct. 1st Dist. 2014).

25 U.S.—[Berry v. Schmitt](#), 688 F.3d 290 (6th Cir. 2012).

Va.—[Volkswagen of America, Inc. v. Smit](#), 279 Va. 327, 689 S.E.2d 679 (2010).

26 Va.—[Volkswagen of America, Inc. v. Smit](#), 279 Va. 327, 689 S.E.2d 679 (2010).

27 Cal.—[Young v. Municipal Court](#), 16 Cal. App. 3d 766, 94 Cal. Rptr. 331 (3d Dist. 1971).

28 U.S.—[Baker v. Registered Dentists of Oklahoma](#), 543 F. Supp. 1177 (W.D. Okla. 1982).

Conn.—[Ramos v. Town of Vernon](#), 254 Conn. 799, 761 A.2d 705 (2000).

29 Iowa—[State v. Reed](#), 618 N.W.2d 327 (Iowa 2000).

Mo.—[State v. Jeffrey](#), 400 S.W.3d 303 (Mo. 2013).

Wash.—[Longview Fibre Co. v. State, Dept. of Ecology](#), 89 Wash. App. 627, 949 P.2d 851 (Div. 2 1998).

30 U.S.—[U.S. v. Harris](#), 705 F.3d 929 (9th Cir. 2013), cert. denied, 133 S. Ct. 1510, 185 L. Ed. 2d 561 (2013).

Conn.—[Rocque v. Farricielli](#), 269 Conn. 187, 848 A.2d 1206 (2004).

Ga.—[Pecina v. State](#), 274 Ga. 416, 554 S.E.2d 167 (2001).

Ill.—[People v. Greco](#), 204 Ill. 2d 400, 274 Ill. Dec. 73, 790 N.E.2d 846 (2003).

Ky.—[Stinson v. Com.](#), 396 S.W.3d 900 (Ky. 2013).

La.—[State v. Interiano](#), 868 So. 2d 9 (La. 2004).

Me.—[State v. McLaughlin](#), 2002 ME 55, 794 A.2d 69 (Me. 2002).

Miss.—[Hill v. State](#), 853 So. 2d 100 (Miss. 2003).

Mo.—[State v. Self](#), 155 S.W.3d 756, 195 Ed. Law Rep. 1019 (Mo. 2005).

N.Y.—[People v. Rubin](#), 96 N.Y.2d 548, 731 N.Y.S.2d 908, 757 N.E.2d 762 (2001).

Pa.—[Com. v. Packer](#), 568 Pa. 481, 798 A.2d 192 (2002).

S.D.—[State v. Asmussen](#), 2003 SD 102, 668 N.W.2d 725 (S.D. 2003).

Va.—[Motley v. Virginia State Bar](#), 260 Va. 243, 536 S.E.2d 97 (2000).

Wash.—[State v. Eckblad](#), 152 Wash. 2d 515, 98 P.3d 1184 (2004).

31 Del.—[Crissman v. Delaware Harness Racing Com'n](#), 791 A.2d 745 (Del. 2002).

Neb.—[State v. Faber](#), 264 Neb. 198, 647 N.W.2d 67 (2002).

Tex.—[Margraves v. State](#), 34 S.W.3d 912, 150 Ed. Law Rep. 549 (Tex. Crim. App. 2000) (abrogated on other grounds by, [Laster v. State](#), 275 S.W.3d 512 (Tex. Crim. App. 2009)).

Rationale

Because facial challenges to statutes are generally disfavored, and legislative enactments carry a strong presumption of constitutionality, a court's task when presented with both a facial and an "as applied" argument is first to decide whether the assailed statute is impermissibly vague as applied to the defendant.

N.Y.—[People v. Stuart](#), 100 N.Y.2d 412, 765 N.Y.S.2d 1, 797 N.E.2d 28 (2003).

32 Md.—[Galloway v. State](#), 365 Md. 599, 781 A.2d 851 (2001).

33 U.S.—[Kimmel v. Florida Bd. of Regents](#), 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 140 Ed. Law Rep. 825, 187 A.L.R. Fed. 543 (2000).

34 Tex.—[Ex parte Ellis](#), 309 S.W.3d 71 (Tex. Crim. App. 2010).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

5. Scope of Inquiry

§ 244. Operation of statute—Effect on protected rights

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  969, 981, 984

The constitutionality of a statute may depend on its natural effect on constitutional rights.

In determining the constitutionality of a statute, a court will ascertain its practical operation and its natural and reasonable effect on the constitutional right involved.¹ Whenever state action is challenged as a denial of liberty, the question always is whether the State has violated the essential attributes of that liberty.² State laws that impinge on personal rights protected by the U.S. Constitution are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.³

A court will decide the constitutionality of a statute challenged on procedural due process grounds only as it applies to the particular facts at hand, and a party challenging the constitutionality of the statute must prove that the statute has adversely affected a protected interest under the facts of the particular case and not merely under some possible or hypothetical set of facts not proven to exist.⁴

Footnotes

- 1 U.S.—[Reitman v. Mulkey](#), 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); [American Oil Co. v. Neill](#), 380 U.S. 451, 85 S. Ct. 1130, 14 L. Ed. 2d 1 (1965).
- Cal.—[County of Los Angeles v. Superior Court](#), 13 Cal. 3d 721, 119 Cal. Rptr. 631, 532 P.2d 495 (1975).
- Del.—[Wilson v. State](#), 264 A.2d 510 (Del. 1970).
- Fla.—[Sparkman v. State ex rel. Scott](#), 58 So. 2d 431 (Fla. 1952).
- Ga.—[Cade v. State](#), 207 Ga. 135, 60 S.E.2d 763 (1950).
- Ill.—[People ex rel. Gendron v. Ingram](#), 34 Ill. 2d 623, 217 N.E.2d 803 (1966).
- N.H.—[Opinion of the Justices](#), 99 N.H. 505, 105 A.2d 924 (1954).
- N.J.—[Jamouneau v. Harner](#), 16 N.J. 500, 109 A.2d 640 (1954).
- Wis.—[WKBH Television, Inc. v. Wisconsin Dept. of Revenue](#), 75 Wis. 2d 557, 250 N.W.2d 290 (1977).
- 2 U.S.—[Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe](#), 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 1143 (1942).
- Ala.—[Alabama State Federation of Labor v. McAdory](#), 246 Ala. 1, 18 So. 2d 810 (1944).
- First Amendment**
- In passing on the constitutionality of local regulations, such as those relating to use of sound amplification devices, courts must balance various community interests but must keep First Amendment freedoms in a preferred position.
- U.S.—[Saia v. People of State of New York](#), 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948).
- 3 U.S.—[City of Cleburne, Tex. v. Cleburne Living Center](#), 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).
- As to strict scrutiny test, see § 1279.
- 4 Conn.—[State v. Long](#), 268 Conn. 508, 847 A.2d 862 (2004).

16 C.J.S. Constitutional Law § 245

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

5. Scope of Inquiry

§ 245. Consideration of extrinsic evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  655, 969, 981, 984

There is a conflict of authority on the issue of the admissibility of extrinsic evidence when determining constitutional questions.

One view is that extrinsic evidence is not admissible on the question whether a legislature has complied with constitutional limitations.¹ The enrolled and engrossed bill, properly authenticated, is conclusive as to the regularity of the enactment,² and courts may not inquire concerning the truth of the facts on which the legislative act is predicated.³ While a court may consider the legislative history⁴ and judicially notice facts reflected in it,⁵ it must confine itself to consideration of matters so noticed and those matters that appear on the face of the law.⁶ Under the standard of review requiring that a statutory classification have a rational basis,⁷ a state has no obligation to produce evidence to sustain the rationality of the classification, and the courts are required to accept the legislature's generalizations⁸ as those attacking the classification have the burden of proof.⁹

There is other authority that the invalidity of legislative action may be shown by facts established by evidence,¹⁰ and where the determination whether a statute is unreasonable, arbitrary, or not related to the ends proposed turns on factual considerations, a court may consider those facts and hear evidence with respect to them.¹¹

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Footnotes

- 1 U.S.—[Daniel v. Family Sec. Life Ins. Co.](#), 336 U.S. 220, 69 S. Ct. 550, 93 L. Ed. 632, 10 A.L.R.2d 945 (1949).
Ariz.—[American Federation of Labor v. American Sash & Door Co.](#), 67 Ariz. 20, 189 P.2d 912 (1948), judgment aff'd, 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A.L.R.2d 481 (1949).
Fla.—[Crandon v. Hazlett](#), 157 Fla. 574, 26 So. 2d 638 (1946).
Ind.—[Department of Ins. v. Schoonover](#), 225 Ind. 187, 72 N.E.2d 747 (1947).
W. Va.—[State ex rel. Armbrecht v. Thornburg](#), 137 W. Va. 60, 70 S.E.2d 73 (1952).
- 2 Iowa—[Carlton v. Grimes](#), 237 Iowa 912, 23 N.W.2d 883 (1946).
N.M.—[Thompson v. Saunders](#), 1947-NMSC-075, 52 N.M. 1, 189 P.2d 87 (1947).
- 3 W. Va.—[State ex rel. Armbrecht v. Thornburg](#), 137 W. Va. 60, 70 S.E.2d 73 (1952).
- 4 Tex.—[FM Properties Operating Co. v. City of Austin](#), 22 S.W.3d 868 (Tex. 2000).
- Examine legislative journals**
Pa.—[Pennsylvania School Boards Ass'n, Inc. v. Commonwealth Ass'n of School Adm'rs, Teamsters Local 502](#), 569 Pa. 436, 805 A.2d 476, 169 Ed. Law Rep. 289, 9 A.L.R.6th 727 (2002).
- 5 Cal.—[Redevelopment Agency of City and County of San Francisco v. Hayes](#), 122 Cal. App. 2d 777, 266 P.2d 105 (1st Dist. 1954).
Ill.—[Scofield v. Board of Ed. of Community Consol. School Dist. No. 181](#), 411 Ill. 11, 103 N.E.2d 640 (1952).
Tenn.—[Fuqua v. Davidson County](#), 189 Tenn. 645, 227 S.W.2d 12 (1950).
- 6 Fla.—[Crandon v. Hazlett](#), 157 Fla. 574, 26 So. 2d 638 (1946).
Iowa—[Carlton v. Grimes](#), 237 Iowa 912, 23 N.W.2d 883 (1946).
N.C.—[Baugh v. Woodard](#), 56 N.C. App. 180, 287 S.E.2d 412 (1982).
S.C.—[Scroggie v. Bates](#), 213 S.C. 141, 48 S.E.2d 634 (1948).
- 7 § 1279.
- 8 U.S.—[Heller v. Doe by Doe](#), 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).
- 9 § 263.
- 10 U.S.—[Weaver v. Palmer Bros. Co.](#), 270 U.S. 402, 46 S. Ct. 320, 70 L. Ed. 654 (1926).
Iowa—[Patterson v. Iowa Bonus Bd.](#), 246 Iowa 1087, 71 N.W.2d 1 (1955).
Pa.—[Harrisburg Dairies v. Eisaman](#), 338 Pa. 58, 11 A.2d 875 (1940).
W. Va.—[State ex rel. Maloney v. McCartney](#), 159 W. Va. 513, 223 S.E.2d 607 (1976).
Wis.—[Ritholz v. Johnson](#), 244 Wis. 494, 12 N.W.2d 738 (1944).
- 11 La.—[Mount v. Board of Com'rs of Gravity Drainage Dist. No. 2 of Tangipahoa Parish](#), 168 La. 969, 123 So. 643 (1929).
Pa.—[Pennsylvania R. Co. v. Driscoll](#), 330 Pa. 97, 198 A. 130 (1938).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

a. Overview

§ 246. Constitutionality of laws favored

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  990, 995, 1002, 1007

Legislative acts are entitled to great respect and weight, and it is the duty of the courts to sustain or uphold them if possible.

Legislative acts are entitled to great respect,¹ deference,² and weight.³ When the power of the legislature to enact a law is called in question, the court should proceed with great caution.⁴ Courts must sustain or uphold statutes, if possible,⁵ and are reluctant to strike down a statute as unconstitutional.⁶ Courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional, and only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality.⁷ A statute may be held unconstitutional only when this is absolutely necessary on the facts or circumstances presented by the particular case.⁸ A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some constitutional provision,⁹ or it clearly, palpably, and without doubt infringes upon the constitution,¹⁰ and any doubt as to the constitutionality of a statute

must be resolved in favor of its constitutionality.¹¹ Courts will assume that a legislature considered the constitutionality of its enactment¹² and will not impute the intent to pass legislation that is inconsistent with the Constitution¹³ nor lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden to it.¹⁴ However, while a court may not easily set aside a considered congressional judgment as unconstitutional, deference to legislative findings does not limit the judicial inquiry when First Amendment rights are at stake.¹⁵

Judicial restraint requires deference to legislative judgments in fairly debatable matters when the constitutionality of legislative acts is challenged.¹⁶ State legislative judgments are entitled to substantial deference in the area of criminal procedure, and a criminal process will be found lacking only where it offends some principle of justice so rooted in tradition and conscience as to be ranked as fundamental.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Any doubts about whether a challenger has met high burden of showing unconstitutionality of statute are resolved in favor of finding the statute constitutional. [1 Pa. Cons. Stat. Ann. § 1922\(3\). Germantown Cab Company v. Philadelphia Parking Authority, 206 A.3d 1030 \(Pa. 2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 Me.—[Maine State Housing Authority v. Depositors Trust Co., 278 A.2d 699 \(Me. 1971\).](#)
Tex.—[State v. Sundaco, Inc., 445 S.W.2d 606 \(Tex. Civ. App. Eastland 1969\)](#), writ refused n.r.e.
- 2 Ala.—[Birmingham-Jefferson Civic Center Authority v. City of Birmingham, 912 So. 2d 204 \(Ala. 2005\).](#)
Wash.—[State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp., 142 Wash. 2d 328, 12 P.3d 134 \(2000\).](#)
- 3 U.S.—[Fullilove v. Klutznick, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 \(1980\).](#)
Ala.—[State v. Alabama Public Service Commission, 293 Ala. 553, 307 So. 2d 521 \(1975\).](#)
Minn.—[Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 \(1968\).](#)
Wis.—[State ex rel. Warren v. Nusbaum, 64 Wis. 2d 314, 219 N.W.2d 577 \(1974\).](#)
- 4 Iowa—[Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 \(Iowa 1970\).](#)
Mich.—[Phillips v. Mirac, Inc., 470 Mich. 415, 685 N.W.2d 174 \(2004\).](#)
Minn.—[City of Pipestone v. Madsen, 287 Minn. 357, 178 N.W.2d 594 \(1970\).](#)
Tenn.—[State v. Collins, 528 S.W.2d 814 \(Tenn. 1975\).](#)
- 5 Ala.—[Pruett v. Delony, 289 Ala. 578, 269 So. 2d 109 \(1972\).](#)
Fla.—[Horsemen's Benev. and Protective Ass'n, Florida Division v. Division of Pari-Mutuel Wagering, Dept. of Business Regulations, 397 So. 2d 692 \(Fla. 1981\).](#)
Kan.—[State, ex rel. Stephan v. Martin, 230 Kan. 759, 641 P.2d 1020 \(1982\).](#)
Ky.—[Padgett v. Sensing, 438 S.W.2d 501 \(Ky. 1969\).](#)
Mass.—[Massachusetts Public Interest Research Group v. Secretary of Com., 375 Mass. 85, 375 N.E.2d 1175 \(1978\).](#)
Neb.—[Blair Co. v. American Sav. Co., 184 Neb. 557, 169 N.W.2d 292 \(1969\).](#)
Nev.—[Board of Regents of University of Nevada System v. Oakley, 97 Nev. 605, 637 P.2d 1199, 1 Ed. Law Rep. 1299 \(1981\).](#)

Ohio—[State ex rel. King v. Rhodes](#), 11 Ohio St. 2d 95, 40 Ohio Op. 2d 109, 228 N.E.2d 653 (1967).

Oklahoma—[White v. Coleman](#), 1970 OK CR 133, 475 P.2d 404 (Okla. Crim. App. 1970).

S.C.—[Casey v. South Carolina State Housing Authority](#), 264 S.C. 303, 215 S.E.2d 184 (1975).

W. Va.—[State ex rel. State Bldg. Commission v. Bailey](#), 151 W. Va. 79, 150 S.E.2d 449 (1966).

Wis.—[State ex rel. Ft. Howard Paper Co. v. State Lake Dist. Bd. of Review](#), 82 Wis. 2d 491, 263 N.W.2d 178 (1978).

Wyo.—[Washakie County School Dist. No. One v. Herschler](#), 606 P.2d 310 (Wyo. 1980).

Courts seek to sustain, rather than strike down, the enactment of a coordinate branch of the government

Ala.—[Jefferson County Com'n v. Edwards](#), 49 So. 3d 685 (Ala. 2010).

Condemn or uphold

The question of constitutionality is not whether it is possible to condemn but whether it is possible to uphold legislative action.

Mont.—[Powder River County v. State](#), 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002).

6

Fla.—[Greene v. Alexander Film Co.](#), 65 So. 2d 53 (Fla. 1953).

Kan.—[State ex rel. Fatzer v. Barnes](#), 171 Kan. 491, 233 P.2d 724 (1951).

Ky.—[Wilson v. Bates](#), 313 Ky. 333, 231 S.W.2d 39 (1950).

Md.—[Pressman v. State Tax Commission](#), 204 Md. 78, 102 A.2d 821 (1954).

N.M.—[Fowler v. Corlett](#), 1952-NMSC-055, 56 N.M. 430, 244 P.2d 1122 (1952).

Or.—[Marr v. Fisher](#), 182 Or. 383, 187 P.2d 966 (1947).

Va.—[Green v. County Bd. of Arlington County](#), 193 Va. 284, 68 S.E.2d 516 (1952).

Utah—[Great Salt Lake Authority v. Island Ranching Co.](#), 18 Utah 2d 45, 414 P.2d 963 (1966), on reh'g, 18 Utah 2d 276, 421 P.2d 504 (1966).

7

N.Y.—[New York State United Teachers ex rel. Iannuzzi v. State](#), 46 Misc. 3d 250, 993 N.Y.S.2d 475, 309 Ed. Law Rep. 1139 (Sup 2014).

8

Minn.—[Carlson v. Smogard](#), 298 Minn. 362, 215 N.W.2d 615 (1974).

9

Ohio—[Kelleys Island Caddy Shack, Inc. v. Zaino](#), 96 Ohio St. 3d 375, 2002-Ohio-4930, 775 N.E.2d 489 (2002).

Mont.—[Powder River County v. State](#), 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002).

S.C.—[State v. Curtis](#), 356 S.C. 622, 591 S.E.2d 600 (2004).

As to reasonable doubt standard of proof, see § 253.

10

Iowa—[Racing Ass'n Of Central Iowa v. Fitzgerald](#), 675 N.W.2d 1 (Iowa 2004).

Mo.—[State v. Kinder](#), 89 S.W.3d 454 (Mo. 2002).

Pa.—[Pennsylvania State Ass'n of Jury Com'rs v. Com.](#), 619 Pa. 369, 64 A.3d 611 (2013).

Va.—[Marshall v. Northern Virginia Transp. Authority](#), 275 Va. 419, 657 S.E.2d 71 (2008).

11

Ark.—[Swenson v. Kane](#), 2014 Ark. 444, 447 S.W.3d 118 (2014).

Del.—[Sheehan v. Oblates of St. Francis de Sales](#), 15 A.3d 1247, 265 Ed. Law Rep. 1133 (Del. 2011).

Ill.—[People v. Patterson](#), 2014 IL 115102, 388 Ill. Dec. 834, 25 N.E.3d 526 (Ill. 2014).

Ind.—[Zoeller v. Sweeney](#), 19 N.E.3d 749 (Ind. 2014).

Kan.—[State v. Wilkins](#), 50 Kan. App. 2d 1120, 336 P.3d 336 (2014).

Miss.—[Houston v. State](#), 150 So. 3d 157 (Miss. Ct. App. 2014).

Mo.—[Dujakovich v. Carnahan](#), 370 S.W.3d 574 (Mo. 2012).

N.H.—[American Federation of Teachers v. State](#), 2015 WL 222181 (N.H. 2015).

N.D.—[State v. Birchfield](#), 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).

Neb.—[State v. Loyuk](#), 289 Neb. 967, 857 N.W.2d 833 (2015).

Pa.—[Com. v. Veon](#), 2015 PA Super 26, 109 A.3d 754 (2015).

Wyo.—[Kordus v. Montes](#), 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).

W. Va.—[State v. James](#), 227 W. Va. 407, 710 S.E.2d 98 (2011).

12

Wash.—[State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.](#), 142 Wash. 2d 328, 12 P.3d 134 (2000).

13

U.S.—[U.S. v. X-Citement Video, Inc.](#), 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994).

W. Va.—[Rohrbaugh v. State](#), 216 W. Va. 298, 607 S.E.2d 404 (2004).

As to presumptions about the legislature's intent, see § 254.

- 14 U.S.—[I.N.S. v. St. Cyr](#), 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); [Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council](#), 485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).
- 15 U.S.—[F.C.C. v. League of Women Voters of California](#), 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278, 39 Fed. R. Serv. 2d 389 (1984).
- 16 Del.—[Helman v. State](#), 784 A.2d 1058 (Del. 2001).
- 17 U.S.—[Herrera v. Collins](#), 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

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16 C.J.S. Constitutional Law § 247

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

a. Overview

§ 247. Construction to safeguard constitutionality

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  990, 994 to 997, 1002 to 1005, 1025, 1026, 1131

A court must avoid interpreting a statute in a manner that would render it clearly unconstitutional if there is another reasonable interpretation available, and a statute may be narrowly construed to sustain its constitutionality.

Even where a statute's constitutionality is fairly debatable, courts will uphold the law,¹ and every reasonable construction must be resorted to in order to save a statute from unconstitutionality.² A court must avoid interpreting a statute in a manner that would render it clearly unconstitutional if there is another reasonable interpretation available.³ Therefore, when reasonably possible, a statute⁴ or an order or regulation⁵ will be construed so as to avoid a constitutional question or uphold its constitutionality.

However, while courts have a duty to interpret statutes in a way as to preserve their constitutionality, they can do so only to the extent that its interpretative authority permits.⁶ Although a court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.⁷ When called on to interpret a statute, courts will search for an effective and constitutional construction that reasonably accords with the legislature's

underlying intent, which principle directs courts to search for a judicial gloss that will effect the legislature's will in a manner consistent with constitutional safeguards.⁸ The courts will not rewrite a law to conform it to constitutional requirements⁹ even as it strives to salvage it from constitutional challenge.¹⁰

Narrow construction.

A statute may be narrowly construed to sustain its constitutionality¹¹ but only if it is readily susceptible to that construction.¹² Unambiguous provisions may not be saved by applying a narrowing construction.¹³

Vagueness.

A statute will be held void for vagueness only if no logical construction can be given to its words¹⁴ and not if it can be given any practical interpretation.¹⁵ On the other hand, a facial challenge to the constitutionality of a statute or ordinance regulating speech may be permitted, even though the government is deprived of the chance to obtain a construction from a state court that would render the statute constitutional, or to establish a local practice that would demonstrate that the law is being constitutionally applied, where the ordinance gives a government official substantial power to discriminate based on the content of speech.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Canon of construction, that the Supreme Court may interpret ambiguous statutory language to avoid serious constitutional doubts, applies only when ambiguity exists. [Iancu v. Brunetti, 139 S. Ct. 2294 \(2019\)](#).

Supreme Court will not rewrite a law to conform it to constitutional requirements. [Iancu v. Brunetti, 139 S. Ct. 2294 \(2019\)](#).

If a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, or raises serious and doubtful constitutional questions, the court will adopt the construction which will render it free from doubt as to its constitutionality, even if the other construction is equally reasonable. [City of Chula Vista v. Sandoval, 49 Cal. App. 5th 539, 263 Cal. Rptr. 3d 236 \(3d Dist. 2020\)](#), review filed, (July 6, 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 N.J.—[State v. Lenihan, 219 N.J. 251, 98 A.3d 533 \(2014\)](#).
- 2 U.S.—[McCauley v. University of the Virgin Islands, 54 V.I. 849, 618 F.3d 232, 260 Ed. Law Rep. 551 \(3d Cir. 2010\)](#); U.S. v. Brune, 767 F.3d 1009 (10th Cir. 2014), cert. denied, [135 S. Ct. 1469 \(2015\)](#).
Nev.—[State v. Hughes, 261 P.3d 1067, 127 Nev. Adv. Op. No. 56 \(Nev. 2011\)](#).
R.I.—[Narragansett Indian Tribe v. State, 2015 WL 917921 \(R.I. 2015\)](#).
W. Va.—[State v. James, 227 W. Va. 407, 710 S.E.2d 98 \(2011\)](#).
- 3 U.S.—[Jones v. U.S., 529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902 \(2000\)](#); [Edmond v. U.S., 520 U.S. 651, 117 S. Ct. 1573, 137 L. Ed. 2d 917 \(1997\)](#).
Minn.—[State v. Tennin, 674 N.W.2d 403 \(Minn. 2004\)](#).
N.Y.—[LaValle v. Hayden, 98 N.Y.2d 155, 746 N.Y.S.2d 125, 773 N.E.2d 490, 168 Ed. Law Rep. 438 \(2002\)](#).

Construction to avoid doubt

When an act of Congress raises serious doubt as to its constitutionality, the Supreme Court will first ascertain whether construction of the statute is fairly possible by which the question may be avoided.

U.S.—[Zadvydas v. Davis](#), 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

4 U.S.—[I.N.S. v. St. Cyr](#), 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); [In re Schafer](#), 689 F.3d 601 (6th Cir. 2012), cert. denied, 133 S. Ct. 1244, 185 L. Ed. 2d 179 (2013).

Ariz.—[State v. Coulter](#), 236 Ariz. 270, 339 P.3d 653 (Ct. App. Div. 1 2014).

Ark.—[Otis v. State](#), 355 Ark. 590, 142 S.W.3d 615 (2004).

Cal.—[People v. Wagner](#), 45 Cal. 4th 1039, 90 Cal. Rptr. 3d 26, 201 P.3d 1168 (2009).

Colo.—[C.S. v. People](#), 83 P.3d 627 (Colo. 2004).

Fla.—[License Acquisitions, LLC v. Debary Real Estate Holdings, LLC](#), 155 So. 3d 1137 (Fla. 2014).

Haw.—[In re Doe](#), 96 Haw. 73, 26 P.3d 562 (2001).

Idaho—[Robison v. Bateman-Hall, Inc.](#), 139 Idaho 207, 76 P.3d 951 (2003).

Ill.—[In re Jordan G.](#), 2015 IL 116834, 2015 WL 728103 (Ill. 2015).

Ind.—[Sims v. United States Fidelity & Guar. Co.](#), 782 N.E.2d 345 (Ind. 2003).

Iowa—[State v. Jenkins](#), 788 N.W.2d 640 (Iowa 2010).

Kan.—[State v. Wilkins](#), 50 Kan. App. 2d 1120, 336 P.3d 336 (2014).

La.—[Louisiana Federation of Teachers v. State](#), 201 L.R.R.M. (BNA) 3694, 2014 WL 5287248 (La. 2014).

Mass.—[Com. v. Fremont Inv. & Loan](#), 459 Mass. 209, 944 N.E.2d 1019 (2011).

Mich.—[People v. Temelkoski](#), 307 Mich. App. 241, 859 N.W.2d 743 (2014).

Mo.—[Rizzo v. State](#), 189 S.W.3d 576 (Mo. 2006).

Mont.—[Montana Media, Inc. v. Flathead County](#), 2003 MT 23, 314 Mont. 121, 63 P.3d 1129 (2003).

Neb.—[Thompson v. Heineman](#), 289 Neb. 798, 857 N.W.2d 731 (2015).

N.J.—[State v. Stanton](#), 176 N.J. 75, 820 A.2d 637 (2003).

N.D.—[Ackre v. Chapman & Chapman, P.C.](#), 2010 ND 167, 788 N.W.2d 344 (N.D. 2010).

Oklahoma—[Powers v. District Court of Tulsa County](#), 2009 OK 91, 227 P.3d 1060 (Okl. 2009), as corrected, (Dec. 29, 2009).

Pa.—[In re F.C. III](#), 607 Pa. 45, 2 A.3d 1201 (2010).

S.C.—[Abbeville County School Dist. v. State](#), 410 S.C. 619, 767 S.E.2d 157, 312 Ed. Law Rep. 917 (2014).

S.D.—[State v. Krahwinkel](#), 2002 SD 160, 656 N.W.2d 451 (S.D. 2002).

Tenn.—[State v. McCoy](#), 2014 WL 6725695 (Tenn. 2014).

Utah—[I.M.L. v. State](#), 2002 UT 110, 61 P.3d 1038 (Utah 2002).

Vt.—[Glidden v. Conley](#), 175 Vt. 111, 2003 VT 12, 820 A.2d 197 (2003).

Wash.—[State v. Williams](#), 171 Wash. 2d 474, 251 P.3d 877 (2011).

W. Va.—[Wampler Foods, Inc. v. Workers' Compensation Div.](#), 216 W. Va. 129, 602 S.E.2d 805 (2004).

Limitation

Courts have a duty to uphold the constitutionality of statutes if at all possible, but it is equally imperative that courts declare legislative enactments invalid when they transgress the constitution.

Wyo.—[Kordus v. Montes](#), 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).

Literal construction

If a literal construction of a statute raises serious constitutional questions, courts are obligated to search for a construction that will accomplish the legislature's purpose without risking the statute's invalidity.

Conn.—[Gaimo v. City of New Haven](#), 257 Conn. 481, 778 A.2d 33 (2001).

Plain language

"Plain language" statutory interpretation must analyze laws to avoid, when possible, constitutional infirmities.

Tex.—[Lebo v. State](#), 90 S.W.3d 324 (Tex. Crim. App. 2002).

Preemption

A court avoids interpreting an ambiguous state statute in a way that would render the statute invalid under the Federal Supremacy Clause and an explicitly preemptive federal law.

Utah—[State v. Mooney](#), 2004 UT 49, 98 P.3d 420 (Utah 2004).

U.S.—[Northwest Hosp., Inc. v. Hospital Service Corp.](#), 687 F.2d 985 (7th Cir. 1982).

Cal.—[D'Amico v. Brock](#), 122 Cal. App. 2d 63, 264 P.2d 120 (3d Dist. 1953).

Md.—[Williams v. Director, Patuxent Inst.](#), 276 Md. 272, 347 A.2d 179 (1975).

- 6 Tex.—[Wilson v. State](#), 448 S.W.3d 418 (Tex. Crim. App. 2014).
- 7 U.S.—[Holder v. Humanitarian Law Project](#), 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355, 49 A.L.R. Fed.
2d 567 (2010).
- 8 Conn.—[State v. DeCicco](#), 315 Conn. 79, 105 A.3d 165 (2014).
- 9 U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); [Ayotte v. Planned Parenthood of Northern New England](#), 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).
- Conn.—[State v. DeCicco](#), 315 Conn. 79, 105 A.3d 165 (2014).
- Pa.—[Coppolino v. Noonan](#), 102 A.3d 1254 (Pa. Commw. Ct. 2014).
- Va.—[Toghill v. Com.](#), 768 S.E.2d 674 (Va. 2015).
- 10 U.S.—[Ayotte v. Planned Parenthood of Northern New England](#), 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).
- 11 U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); [Reno v. American Civil Liberties Union](#), 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).
- Fla.—[Doe v. Mortham](#), 708 So. 2d 929 (Fla. 1998).
- Haw.—[State v. Alangcas](#), 2015 WL 518274 (Haw. 2015).
- Idaho—[MDS Investments, L.L.C. v. State](#), 138 Idaho 456, 65 P.3d 197 (2003).
- La.—[State v. Interiano](#), 868 So. 2d 9 (La. 2004).
- Mass.—[Blixt v. Blixt](#), 437 Mass. 649, 774 N.E.2d 1052 (2002).
- N.J.—[State v. Grate](#), 220 N.J. 317, 106 A.3d 466 (2015).
- Wash.—[State v. Pauling](#), 149 Wash. 2d 381, 69 P.3d 331 (2003).

Overbreadth

- (1) When a federal court is dealing with a federal statute challenged as overbroad, it should construe the statute to avoid constitutional problems if the statute is subject to such a limiting construction.
- U.S.—[New York v. Ferber](#), 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).
- (2) Statutes will be interpreted to avoid constitutional difficulties; thus, where an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies, the court accepts that construction.
- U.S.—[Berger v. City of Seattle](#), 569 F.3d 1029 (9th Cir. 2009).

Criminal statute

To preserve the constitutionality of a criminal statute, courts may give it a narrowing construction to save it from nullification where such construction does not establish a new or different policy basis and is consistent with legislative intent.

- Ind.—[Brown v. State](#), 868 N.E.2d 464 (Ind. 2007).
- 12 U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).
- Wis.—[State v. Stevenson](#), 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).
- 13 Fla.—[Richardson v. Richardson](#), 766 So. 2d 1036 (Fla. 2000).
- 14 Me.—[Town of Baldwin v. Carter](#), 2002 ME 52, 794 A.2d 62 (Me. 2002).
- 15 Idaho—[MDS Investments, L.L.C. v. State](#), 138 Idaho 456, 65 P.3d 197 (2003).
- 16 U.S.—[City of Lakewood v. Plain Dealer Pub. Co.](#), 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

16 C.J.S. Constitutional Law § 248

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

a. Overview

§ 248. Construction to safeguard constitutionality—Multiple constructions possible

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  994, 1002 to 1005, 1025, 1026

Because a court must avoid interpreting a statute in an unconstitutional manner, statutes should be construed so as to avoid doubt as to their constitutionality, if reasonably possible.

When the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save the statute.¹

A court is also obligated to construe a statute to avoid constitutional problems if it is fairly possible to do so,² and a law must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.³ To this end, the "canon of constitutional avoidance" comes into play only when, after the application of ordinary textual analysis, a statute is found to be susceptible of more than one construction and the canon functions as means of choosing between them.⁴ The avoidance canon provides that where an otherwise acceptable construction of a statute would raise serious constitutional problems, a court will construe the statute to avoid that problem unless that construction is plainly contrary to the

legislative intent.⁵ In other words, the doctrine of constitutional avoidance directs that when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice; if one of them would raise a multitude of constitutional problems, the other should prevail.⁶ In applying the canon of constitutional avoidance, the court will consider only those constructions of a statute that are "fairly possible."⁷

The canon of constitutional avoidance is not a method of adjudicating constitutional questions but is a tool for choosing between competing plausible interpretations of a statute's text,⁸ which rests on the reasonable presumption that the legislative branch did not intend the alternative meaning that raises serious constitutional doubt.⁹ Further, the canon of constitutional avoidance does not provide a method for adjudicating constitutional questions that were never reached by the court below under the guise of statutory interpretation.¹⁰ The doctrine of "constitutional doubt" may be invoked only where a statute is susceptible of two constructions¹¹ and when the alternative construction raises a serious likelihood that the statute will be held unconstitutional.¹² Accordingly, the canon of constitutional avoidance does not apply if a statute is not genuinely susceptible to two constructions.¹³

The doctrine is followed out of respect for Congress¹⁴ or a state legislature,¹⁵ which is assumed to legislate in the light of constitutional limitations.¹⁶ This rule, however, must give way where its application would produce a futile result or an unreasonable result plainly at variance with the policy of the legislation as a whole.¹⁷ It is not a license for the judiciary to rewrite the language enacted by the legislature,¹⁸ add new phrases to a statute to save its constitutionality,¹⁹ press the construction of the statute to the point of disingenuous evasion of the constitutional question,²⁰ or ignore the legislative will in order to avoid constitutional adjudication.²¹ A court is limited to construing a statute, so as to save it from constitutional infirmities, by reasonable canons of statutory construction,²² and to choosing between reasonably available interpretations of the statute.²³ A court has the duty to nullify a statute if it is susceptible of no reasonable construction avoiding constitutional problems²⁴ or if the statute's plain language precludes construing it in accordance with constitutional requirements.²⁵

CUMULATIVE SUPPLEMENT

Cases:

The constitutional avoidance doctrine is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020).

The constitutional-doubt canon of statutory construction suggests that courts should construe ambiguous statutes to avoid the need even to address serious questions about their constitutionality. *United States v. Davis*, 139 S. Ct. 2319 (2019).

Respect for due process and constitutional separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe. *U.S. Const. Amend. 5. United States v. Davis*, 139 S. Ct. 2319 (2019).

Where an alternative interpretation of a statute is fairly possible, courts construe legislation in a manner that avoids serious constitutional problems raised by an otherwise acceptable construction. *Artis v. District of Columbia*, 138 S. Ct. 594 (2018).

Constitutional avoidance is the bedrock principle that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, a court is to adopt the latter out of respect for the legislature, assumed to legislate in the light of constitutional limitations. *Arkansas Times LP v. Waldrip*, 988 F.3d 453 (8th Cir. 2021).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[National Collegiate Athletic Ass'n v. Governor of New Jersey](#), 730 F.3d 208 (3d Cir. 2013).
Colo.—[People v. Lovato](#), 2014 COA 113, 2014 WL 4458944 (Colo. App. 2014).
Fla.—[License Acquisitions, LLC v. Debary Real Estate Holdings, LLC](#), 155 So. 3d 1137 (Fla. 2014).
Ind.—[Morgan v. State](#), 22 N.E.3d 570 (Ind. 2014).
La.—[Louisiana Federation of Teachers v. State](#), 201 L.R.R.M. (BNA) 3694, 2014 WL 5287248 (La. 2014).
Mo.—[State v. Holmes](#), 399 S.W.3d 809 (Mo. 2013).
Nev.—[Ford v. State](#), 262 P.3d 1123, 127 Nev. Adv. Op. No. 55 (Nev. 2011).
N.J.—[Strategic Environmental Partners, LLC v. New Jersey Dept. of Environmental Protection](#), 438 N.J. Super. 125, 102 A.3d 939 (App. Div. 2014).
N.M.—[Benavides v. Eastern New Mexico Medical Center](#), 2014-NMSC-037, 338 P.3d 1265 (N.M. 2014).
Tex.—[Peraza v. State](#), 2014 WL 7476214 (Tex. App. Houston 1st Dist. 2014), petition for discretionary review granted, (Mar. 25, 2015) and petition for discretionary review refused, (Mar. 25, 2015).
- 2 U.S.—[Boumediene v. Bush](#), 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008); [Office of Senator Mark Dayton v. Hanson](#), 550 U.S. 511, 127 S. Ct. 2018, 167 L. Ed. 2d 898 (2007).
Colo.—[People v. Jaso](#), 2014 COA 131, 2014 WL 5032716 (Colo. App. 2014).
- 3 U.S.—[Association of Private Sector Colleges and Universities v. Duncan](#), 681 F.3d 427, 280 Ed. Law Rep. 549 (D.C. Cir. 2012).
Wash.—[Utter v. Building Industry Ass'n of Washington](#), 341 P.3d 953 (Wash. 2015).
- 4 U.S.—[Milavetz, Gallop & Milavetz, P.A. v. U.S.](#), 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010); [Clark v. Martinez](#), 543 U.S. 371, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005).
- 5 U.S.—[Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers](#), 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001); [Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council](#), 485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).
As to whether the construction of the statute makes the determination of a constitutional question unnecessary, see § 216.
- Effectuate intent**
Any ambiguity in a statute is to be resolved in a manner that effectuates the intent of the legislature and permits the statute to be found constitutional.
Mass.—[First Justice of Bristol Div. of Juvenile Court Dept. v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dept.](#), 438 Mass. 387, 780 N.E.2d 908 (2003).
- 6 U.S.—[Clark v. Martinez](#), 543 U.S. 371, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005).
- 7 U.S.—[Milavetz, Gallop & Milavetz, P.A. v. U.S.](#), 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010).
- 8 U.S.—[Milavetz, Gallop & Milavetz, P.A. v. U.S.](#), 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010).
Limitations of canon
The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts; the canon should not be applied to limit the scope of authorized executive action.
U.S.—[F.C.C. v. Fox Television Stations, Inc.](#), 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009).
- 9 U.S.—[Clark v. Martinez](#), 543 U.S. 371, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005).
- 10 U.S.—[U.S. v. Apel](#), 134 S. Ct. 1144, 186 L. Ed. 2d 75 (2014).
- 11 U.S.—[Pennsylvania Dept. of Corrections v. Yeskey](#), 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215, 163 A.L.R. Fed. 671 (1998); [Almendarez-Torres v. U.S.](#), 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).
Haw.—[In re Doe](#), 96 Haw. 73, 26 P.3d 562 (2001).
- 12 U.S.—[Almendarez-Torres v. U.S.](#), 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

- 13 U.S.—[Warger v. Shauers](#), 135 S. Ct. 521, 190 L. Ed. 2d 422, 96 Fed. R. Evid. Serv. 186 (2014); [Gonzales v. Carhart](#), 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 20 A.L.R. Fed. 2d 673 (2007).
- 14 U.S.—[Jones v. U.S.](#), 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999); [Almendarez-Torres v. U.S.](#), 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).
- 15 N.J.—[State v. Johnson](#), 166 N.J. 523, 766 A.2d 1126 (2001).
- 16 U.S.—[Jones v. U.S.](#), 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999); [Almendarez-Torres v. U.S.](#), 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).
- 17 N.J.—[State v. Johnson](#), 166 N.J. 523, 766 A.2d 1126 (2001).
- U.S.—[Shapiro v. U.S.](#), 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948).

Legislative will

Canon of construction that federal statutes are to be construed so as to avoid serious doubts of constitutionality does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication.

U.S.—[Commodity Futures Trading Com'n v. Schor](#), 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

18 U.S.—[Salinas v. U.S.](#), 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997); [Chapman v. U.S.](#), 500 U.S. 453, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991).

Cal.—[People v. Bunn](#), 27 Cal. 4th 1, 115 Cal. Rptr. 2d 192, 37 P.3d 380 (2002).

Fla.—[Florida Dept. Of Children And Families v. F.L.](#), 880 So. 2d 602 (Fla. 2004).

Tex.—[Lebo v. State](#), 90 S.W.3d 324 (Tex. Crim. App. 2002).

Vt.—[Martin v. State, Agency of Transp. Dept. of Motor Vehicles](#), 175 Vt. 80, 2003 VT 14, 819 A.2d 742 (2003).

Requirement not supported by statute

The principle that statutes should be construed to avoid serious constitutional problems does not authorize courts to interpolate into a provision a requirement that is not supported by the statutory text and that was consciously rejected by the legislature that enacted the provision.

D.C.—[Duffee v. District of Columbia](#), 93 A.3d 1273 (D.C. 2014).

19 Ky.—[Com. v. Harrelson](#), 14 S.W.3d 541 (Ky. 2000).

Minn.—[Chapman v. Commissioner of Revenue](#), 651 N.W.2d 825 (Minn. 2002).

20 U.S.—[Miller v. French](#), 530 U.S. 327, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000).

Cal.—[People v. Gutierrez](#), 58 Cal. 4th 1354, 171 Cal. Rptr. 3d 421, 324 P.3d 245 (2014).

21 U.S.—[Stern v. Marshall](#), 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).

22 Utah—[I.M.L. v. State](#), 2002 UT 110, 61 P.3d 1038 (Utah 2002).

As to the construction of statutes in light of constitutional challenges, see § 238.

23 U.S.—[Whitman v. American Trucking Associations](#), 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

24 Alaska—[Bonjour v. Bonjour](#), 592 P.2d 1233 (Alaska 1979).

Oklahoma—[Neill v. State](#), 1994 OK CR 69, 896 P.2d 537 (Oklahoma Crim. App. 1994).

25 Vt.—[Glidden v. Conley](#), 175 Vt. 111, 2003 VT 12, 820 A.2d 197 (2003).

Plain reading

A court should not strain to interpret a statute as constitutional; a plain reading must make the interpretation reasonable.

Wash.—[Washington State Republican Party v. Washington State Public Disclosure Com'n](#), 141 Wash. 2d 245, 4 P.3d 808 (2000).

16 C.J.S. Constitutional Law § 249

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

b. Presumption in Favor of Constitutionality

(1) General Principles

§ 249. Presumption that statutes are constitutional, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 656, 990 to 1005

Statutes are presumed to be valid and constitutional.

It is presumed that a legislature has acted within its constitutional powers.¹ Thus, a statute, or a regularly enacted legislative act, is presumed to be valid and constitutional.² The same presumption applies with respect to decisions or orders of an administrative body or officer exercising powers pursuant to statutory authority³ and a joint resolution enacted pursuant to constitutional provisions and having the force and effect of a statute.⁴ Every reasonable presumption is also indulged in favor of a state constitutional amendment adopted at a general election when challenged on the basis that the enactment procedure did not conform to constitutional requirements.⁵

The presumption of constitutionality obtains unless the invalidity of the statute or administrative action clearly appears⁶ or until it has otherwise been judicially declared⁷ by a competent tribunal.⁸ Given that all presumptions and intemds favor the constitutional validity of a statute, mere doubt does not afford sufficient reason for a judicial declaration of invalidity.⁹

Every act of a legally constituted body is *prima facie* constitutional.¹⁰ Thus, the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be presumed unless its unconstitutionality appears beyond a reasonable doubt.¹¹

Advisory opinion.

In the case of a statute not yet enacted, as to which a branch of the legislature propounds questions to the court with respect to constitutionality, there is no presumption of constitutionality,¹² and a serious question of the validity of the proposed legislation should be resolved against finding that its passage would be consistent with the constitution.¹³

CUMULATIVE SUPPLEMENT

Cases:

All duly enacted legislation enjoys a strong presumption of validity, and will only be declared void if it violates the Constitution clearly, palpably and plainly. *Lohr v. Saratoga Partners, L.P.*, 238 A.3d 1198 (Pa. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982).
Ala.—*Bynum v. City of Oneonta*, 2015 WL 836700 (Ala. 2015).
Ariz.—*Gallardo v. State*, 236 Ariz. 84, 336 P.3d 717, 310 Ed. Law Rep. 1125 (2014).
Ark.—*Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844 (2014).
Cal.—*Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 96 Cal. Rptr. 2d 485, 999 P.2d 718 (2000).
Haw.—*State v. Alangcas*, 2015 WL 518274 (Haw. 2015).
La.—*Louisiana Federation of Teachers v. State*, 201 L.R.R.M. (BNA) 3694, 2014 WL 5287248 (La. 2014).
Miss.—*Board of Trustees of State Institutions of Higher Learning v. Ray*, 809 So. 2d 627, 163 Ed. Law Rep. 508 (Miss. 2002).
N.M.—*State ex rel. Public Employees Retirement Ass'n v. Longacre*, 2002-NMSC-033, 133 N.M. 20, 59 P.3d 500 (2002).
R.I.—*Narragansett Indian Tribe v. State*, 2015 WL 917921 (R.I. 2015).
S.C.—*State v. Smith*, 271 S.C. 317, 247 S.E.2d 331 (1978).

As to presumptions regarding the legislature's intention, see § 254.

Amended statute

If the Supreme Court invokes a clear statement rule to advise that certain statutory interpretations are favored to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text, and if Congress amends, its intent must be respected even if a difficult constitutional question is presented; the usual presumption is that members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one, and

the judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case.

U.S.—[Boumediene v. Bush](#), 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008).

Respect for coordinate branch

Due respect for the decisions of a coordinate branch of government demands that the Supreme Court invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.

U.S.—[U.S. v. Morrison](#), 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).

No presumption of violation

A court does not presume that a legislature violated the constitution unless unambiguous language of the statute so mandates.

Ind.—[Sims v. United States Fidelity & Guar. Co.](#), 782 N.E.2d 345 (Ind. 2003).

No flaw

When determining whether a legislative enactment oversteps constitutional bounds, a court proceeds under the assumption that the statute bears no constitutional flaw.

Mo.—[State ex rel. Hilburn v. Staeden](#), 91 S.W.3d 607 (Mo. 2002).

2

U.S.—[Parham v. Hughes](#), 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979).

Ala.—[Bynum v. City of Oneonta](#), 2015 WL 836700 (Ala. 2015).

Ark.—[Landers v. Jameson](#), 355 Ark. 163, 132 S.W.3d 741, 16 A.L.R.6th 851 (2003).

Cal.—[People v. Garcia](#), 230 Cal. App. 4th 763, 178 Cal. Rptr. 3d 883 (3d Dist. 2014), review denied, (Jan. 21, 2015).

Colo.—[Figueroa v. Speers](#), 2015 CO 12, 343 P.3d 967 (Colo. 2015).

Fla.—[License Acquisitions, LLC v. Debary Real Estate Holdings, LLC](#), 155 So. 3d 1137 (Fla. 2014).

Ga.—[Sentinel Offender SVCS., LLC v. Glover](#), 296 Ga. 315, 766 S.E.2d 456 (2014).

Haw.—[State v. Bui](#), 104 Haw. 462, 92 P.3d 471 (2004).

Idaho—[State v. Mowrey](#), 134 Idaho 751, 9 P.3d 1217 (2000).

Ill.—[In re Jordan G.](#), 2015 IL 116834, 2015 WL 728103 (Ill. 2015).

Ind.—[Morgan v. State](#), 22 N.E.3d 570 (Ind. 2014).

Kan.—[State v. Wilkins](#), 50 Kan. App. 2d 1120, 336 P.3d 336 (2014).

Ky.—[Fox v. Grayson](#), 317 S.W.3d 1 (Ky. 2010).

La.—[Huber v. Midkiff](#), 838 So. 2d 771 (La. 2003).

Md.—[Walker v. State](#), 432 Md. 587, 69 A.3d 1066, 295 Ed. Law Rep. 190 (2013).

Mass.—[DIRECTV, LLC v. Department of Revenue](#), 470 Mass. 647, 25 N.E.3d 258 (2015).

Me.—[Doe v. Anderson](#), 2015 ME 3, 108 A.3d 378 (Me. 2015).

Mich.—[People v. Temelkoski](#), 307 Mich. App. 241, 859 N.W.2d 743 (2014).

Minn.—[In re Guardianship, Conservatorship of Durand](#), 859 N.W.2d 780 (Minn. 2015).

Miss.—[In re Fiscal Year 2010 Judicial Branch Appropriations](#), 27 So. 3d 394 (Miss. 2010).

Mo.—[Lewellen v. Franklin](#), 441 S.W.3d 136 (Mo. 2014).

Mont.—[Billings Yellow Cab, LLC v. State ex rel. Dept. of Public Service Regulation](#), 2014 MT 275, 376 Mont. 463, 335 P.3d 1223 (2014).

Neb.—[Thompson v. Heineman](#), 289 Neb. 798, 857 N.W.2d 731 (2015).

N.H.—[City of Manchester v. Secretary of State](#), 163 N.H. 689, 48 A.3d 864 (2012).

N.J.—[Strategic Environmental Partners, LLC v. New Jersey Dept. of Environmental Protection](#), 438 N.J. Super. 125, 102 A.3d 939 (App. Div. 2014).

N.M.—[Moses v. Skandera](#), 2014 WL 5454834 (N.M. Ct. App. 2014).

N.C.—[State v. Daniels](#), 741 S.E.2d 354 (N.C. Ct. App. 2012), appeal dismissed, review denied, 366 N.C. 565, 738 S.E.2d 389 (2013).

Nev.—[Byars v. State](#), 336 P.3d 939, 130 Nev. Adv. Op. No. 85 (Nev. 2014).

Ohio—[Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray](#), 127 Ohio St. 3d 104, 2010-Ohio-4908, 936 N.E.2d 944 (2010).

Pa.—[Friends of Pennsylvania Leadership Charter School v. Chester County Bd. of Assessment Appeals](#), 101 A.3d 66, 310 Ed. Law Rep. 1007 (Pa. 2014).

R.I.—[Oden v. Schwartz](#), 71 A.3d 438 (R.I. 2013).

S.C.—[Abbeville County School Dist. v. State](#), 410 S.C. 619, 767 S.E.2d 157, 312 Ed. Law Rep. 917 (2014).

S.D.—[Tracfone Wireless, Inc. v. South Dakota Dept. of Revenue and Regulation](#), 2010 SD 6, 778 N.W.2d 130 (S.D. 2010).

Tenn.—[State v. McCoy](#), 2014 WL 6725695 (Tenn. 2014).

Tex.—[Kfouri v. State](#), 312 S.W.3d 89 (Tex. App. Houston 14th Dist. 2010).

Utah—[State v. Roberts](#), 2015 UT 24, 2015 WL 404627 (Utah 2015).

Vt.—[Glidden v. Conley](#), 175 Vt. 111, 2003 VT 12, 820 A.2d 197 (2003).

Va.—[Marshall v. Northern Virginia Transp. Authority](#), 275 Va. 419, 657 S.E.2d 71 (2008).

Wash.—[In re A.W.](#), 2015 WL 710549 (Wash. 2015).

Wis.—[In re Commitment of Alger](#), 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346 (2015).

Wyo.—[Kordus v. Montes](#), 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).

Equitable factor

The presumption of constitutionality, which attaches to every act of Congress, is an equity to be considered in favor of the government in balancing hardships.

U.S.—[Walters v. National Ass'n of Radiation Survivors](#), 468 U.S. 1323, 105 S. Ct. 11, 82 L. Ed. 2d 908 (1984).

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U.S.—[U.S. v. Rock Royal Co-op.](#), 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939).

Idaho—[Justus v. Board of Equalization of Kootenai County](#), 101 Idaho 743, 620 P.2d 777 (1980).

Oklahoma—[Jack Lincoln Shops v. State Dry Cleaners' Bd.](#), 1943 OK 28, 192 Okla. 251, 135 P.2d 332 (1943).

Attorney discipline rule

Va.—[Motley v. Virginia State Bar](#), 260 Va. 243, 536 S.E.2d 97 (2000).

4

Colo.—[Asphalt Paving Co. v. County Com'rs of Jefferson County](#), 162 Colo. 254, 425 P.2d 289 (1967).

Oklahoma—[Wright v. State](#), 1943 OK 198, 192 Okla. 493, 137 P.2d 796 (1943).

5

Haw.—[Watland v. Lingle](#), 104 Haw. 128, 85 P.3d 1079 (2004), as clarified, (Mar. 19, 2004).

6

Ala.—[City of Daphne v. City of Spanish Fort](#), 853 So. 2d 933 (Ala. 2003).

Ark.—[Cato v. Craighead County Circuit Court](#), 2009 Ark. 334, 322 S.W.3d 484 (2009).

Ill.—[People v. Rush](#), 2014 IL App (1st) 123462, 386 Ill. Dec. 43, 19 N.E.3d 1196 (App. Ct. 1st Dist. 2014).

Ind.—[Zoeller v. Sweeney](#), 19 N.E.3d 749 (Ind. 2014).

Mich.—[People v. Temelkoski](#), 307 Mich. App. 241, 859 N.W.2d 743 (2014).

Mo.—[Lewellen v. Franklin](#), 441 S.W.3d 136 (Mo. 2014).

Neb.—[Thompson v. Heineman](#), 289 Neb. 798, 857 N.W.2d 731 (2015).

Nev.—[Zahavi v. State](#), 343 P.3d 595, 131 Nev. Adv. Op. No. 7 (Nev. 2015).

N.D.—[State v. Birchfield](#), 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).

Pa.—[City of Philadelphia v. Com.](#), 575 Pa. 542, 838 A.2d 566 (2003).

S.D.—[State v. Geise](#), 2002 SD 161, 656 N.W.2d 30 (S.D. 2002).

Va.—[Wilkins v. West](#), 264 Va. 447, 571 S.E.2d 100 (2002).

Utah—[Jones v. Utah Board of Pardons & Parole](#), 2004 UT 53, 94 P.3d 283 (Utah 2004).

Wash.—[Ralph v. State Dept. of Natural Resources](#), 182 Wash. 2d 242, 343 P.3d 342 (2014).

As to the need to show that a statute is clearly unconstitutional, see § 253.

Federal statute

Overcoming the presumption that a federal statute is constitutional requires a plain showing that Congress has exceeded its constitutional bounds.

U.S.—[U.S. v. Brune](#), 767 F.3d 1009 (10th Cir. 2014), cert. denied, 135 S. Ct. 1469 (2015).

Manifestly infringe

It is only when statutes manifestly infringe upon some constitutional provision that they may be declared void.

Utah—[Jones v. Utah Board of Pardons & Parole](#), 2004 UT 53, 94 P.3d 283 (Utah 2004).

Plainly repugnant to constitution

Va.—[Wilkins v. West](#), 264 Va. 447, 571 S.E.2d 100 (2002).

7

Ala.—[Opinion of the Justices](#), 294 Ala. 604, 320 So. 2d 622 (1975).

Fla.—[Deltona Corp. v. Bailey](#), 336 So. 2d 1163 (Fla. 1976).

8

Ind.—[Mitchell v. Drake](#), 172 Ind. App. 376, 360 N.E.2d 195 (1977).

La.—[Gulf Oil Corp. v. State Mineral Bd.](#), 317 So. 2d 576 (La. 1974).

Me.—[In re Opinion of the Justices](#), 147 Me. 25, 83 A.2d 213 (1951).

Neb.—[Williams v. Buffalo County](#), 181 Neb. 233, 147 N.W.2d 776 (1967).

As to what tribunals may determine constitutional issues, see §§ 209 et seq.

9 Cal.—[People v. Garcia](#), 230 Cal. App. 4th 763, 178 Cal. Rptr. 3d 883 (3d Dist. 2014), review denied, (Jan. 21, 2015).

10 Fla.—[A. M. Klemm & Son v. City of Winter Haven](#), 141 Fla. 60, 192 So. 652 (1939).
Ohio—[City of Miamisburg v. Clayman](#), 34 Ohio L. Abs. 263, 37 N.E.2d 94 (Ct. App. 2d Dist. Montgomery County 1941).

11 Mont.—[Powder River County v. State](#), 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002).
As to the showing required to overcome the presumption, see § 253.

12 Colo.—[In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6](#), 94 Colo. 101, 31 P.2d 325 (1933).

13 Or.—[Starr v. Laundry and Dry Cleaning Workers' Local Union No. 101](#), 155 Or. 634, 63 P.2d 1104 (1936).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

b. Presumption in Favor of Constitutionality

(1) General Principles

§ 250. Strength of presumption; rebuttal

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  656, 990 to 1005

The presumption of constitutionality of statutes is strong but rebuttable.

There is a strong presumption in favor of the constitutionality or validity of a statute¹ or of a decision of an administrative body exercising legislative powers.² The presumption in favor of constitutionality is especially strong in the case of statutes enacted to promote a public purpose,³ such as statutes relating to taxation.⁴

The application of a presumption of constitutionality does not mean a statute will always survive judicial scrutiny; even if a statute is presumed constitutional, it will fall if it manifestly infringes upon a constitutional provision.⁵ Therefore, despite the presumption that statutes are constitutional, a court ultimately decides a statute's constitutionality,⁶ and it is nevertheless the duty of a court, in some instances, to declare legislative acts unconstitutional.⁷ The presumption concerning the constitutionality

of statutes is not conclusive⁸ but is rebuttable.⁹ It may be rebutted by evidence showing the actual existence of facts or circumstances under which the statute, as a matter of law, is unconstitutional¹⁰ or by negating every reasonable basis on which the statute can be sustained.¹¹ However, the presumption is conclusive unless the legislative enactment is clearly shown to be prohibited by the state or federal constitution.¹²

CUMULATIVE SUPPLEMENT

Cases:

There is a strong presumption that a legislative enactment is valid and constitutional. *Araujo v. Bryant*, 283 So. 3d 73 (Miss. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Miller v. Raytheon Co.](#), 716 F.3d 138 (5th Cir. 2013) (stating Texas law).
Ark.—[Brown v. State](#), 2015 Ark. 16, 2015 WL 301449 (2015).
Conn.—[Cefaratti v. Aranow](#), 154 Conn. App. 1, 105 A.3d 265 (2014).
Del.—[Monceaux v. State](#), 51 A.3d 474 (Del. 2012).
Idaho—[BHA Investments, Inc. v. State](#), 138 Idaho 348, 63 P.3d 474 (2003).
Ill.—[People v. Botruff](#), 212 Ill. 2d 166, 288 Ill. Dec. 105, 817 N.E.2d 463 (2004).
Iowa—[Racing Ass'n Of Central Iowa v. Fitzgerald](#), 675 N.W.2d 1 (Iowa 2004).
Mass.—[Sylvester v. Commissioner Of Revenue](#), 445 Mass. 304, 837 N.E.2d 662 (2005).
Miss.—[Mississippi Power Co., Inc. v. Mississippi Public Service Com'n](#), 2015 WL 574723 (Miss. 2015).
Mo.—[Home Builders Ass'n of Greater St. Louis v. State](#), 75 S.W.3d 267 (Mo. 2002).
N.H.—[State v. Porelle](#), 149 N.H. 420, 822 A.2d 562 (2003).
N.D.—[State v. Birchfield](#), 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).
Ohio—[Viviano v. Sandusky](#), 2013-Ohio-2813, 991 N.E.2d 1263 (Ohio Ct. App. 6th Dist. Erie County 2013).
S.D.—[State v. Myers](#), 2014 SD 88, 857 N.W.2d 597 (S.D. 2014).
Va.—[Wilkins v. West](#), 264 Va. 447, 571 S.E.2d 100 (2002).
Wis.—[State v. Cole](#), 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (2003).

Necessity for rule

The necessity for adherence to this rule is that it prohibits one branch of state government from encroaching on duties and prerogatives of another.

Ohio—[State v. Renalist, Inc.](#), 56 Ohio St. 2d 276, 10 Ohio Op. 3d 408, 383 N.E.2d 892 (1978).

Heavy presumption of constitutionality

Ill.—[Friends of Parks v. Chicago Park Dist.](#), 203 Ill. 2d 312, 271 Ill. Dec. 903, 786 N.E.2d 161 (2003).

Liquor control law

State liquor control laws that fall within the core of the State's power to regulate liquor distribution under the Twenty-First Amendment are supported by a strong presumption of validity.

U.S.—[North Dakota v. U.S.](#), 495 U.S. 423, 110 S. Ct. 1986, 109 L. Ed. 2d 420 (1990).

- 2 Or.—[State v. Lloyd A. Fry Roofing Co.](#), 9 Or. App. 189, 495 P.2d 751, 51 A.L.R.3d 1007 (1972), adhered to, 11 Or. App. 403, 502 P.2d 1162 (1972).

Agricultural assessments

Assessments against fruit growers and processors to fund generic advertising under marketing orders pursuant to the Agricultural Marketing Agreement Act enjoyed a strong presumption of validity accorded to policy judgments by Congress.

U.S.—[Glickman v. Wileman Bros. & Elliott, Inc.](#), 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997).

3 Colo.—[Rathke v. MacFarlane](#), 648 P.2d 648 (Colo. 1982).

Fla.—[Pasco v. Heggen](#), 314 So. 2d 1 (Fla. 1975).

Iowa—[Millsap v. Cedar Rapids Civil Service Com'n](#), 249 N.W.2d 679 (Iowa 1977).

Md.—[Commission on Medical Discipline v. Stillman](#), 291 Md. 390, 435 A.2d 747 (1981).

Wis.—[Bisenius v. Karns](#), 42 Wis. 2d 42, 165 N.W.2d 377 (1969).

Government payment of monetary benefits

U.S.—[Califano v. Gautier Torres](#), 435 U.S. 1, 98 S. Ct. 906, 55 L. Ed. 2d 65 (1978).

Municipal finance

N.Y.—[Wein v. Beame](#), 43 N.Y.2d 326, 401 N.Y.S.2d 458, 372 N.E.2d 300 (1977).

4 U.S.—[U.S. v. Jacobs](#), 306 U.S. 363, 59 S. Ct. 551, 83 L. Ed. 763 (1939).

Conn.—[McKinney v. Town of Coventry](#), 176 Conn. 613, 410 A.2d 453 (1979).

Iowa—[Lee Enterprises, Inc. v. Iowa State Tax Commission](#), 162 N.W.2d 730 (Iowa 1968).

Wis.—[Simanco, Inc. v. Wisconsin Dept. of Revenue](#), 57 Wis. 2d 47, 203 N.W.2d 648 (1973).

5 Ga.—[Dawson v. State](#), 274 Ga. 327, 554 S.E.2d 137 (2001).

Wis.—[State v. Cole](#), 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (2003).

6 Colo.—[Woldt v. People](#), 64 P.3d 256 (Colo. 2003).

7 N.C.—[State v. Webb](#), 358 N.C. 92, 591 S.E.2d 505 (2004).

Wyo.—[Painter v. Abels](#), 998 P.2d 931 (Wyo. 2000).

8 Cal.—[McKay Jewelers v. Bowron](#), 19 Cal. 2d 595, 122 P.2d 543, 139 A.L.R. 1188 (1942).

Mass.—[Sears v. Treasurer and Receiver General](#), 327 Mass. 310, 98 N.E.2d 621 (1951).

9 N.Y.—[LaValle v. Hayden](#), 98 N.Y.2d 155, 746 N.Y.S.2d 125, 773 N.E.2d 490, 168 Ed. Law Rep. 438 (2002).

Ohio—[DeRolph v. State](#), 78 Ohio St. 3d 193, 1997-Ohio-84, 677 N.E.2d 733, 116 Ed. Law Rep. 1140 (1997), opinion clarified, 78 Ohio St. 3d 419, 1997-Ohio-87, 678 N.E.2d 886 (1997) and order clarified, 83 Ohio St. 3d 1212, 1998-Ohio-301, 699 N.E.2d 518, 129 Ed. Law Rep. 452 (1998).

As to the burden of rebutting the presumption, see § 259.

Equal protection

Equal protection analysis begins with the rebuttable presumption that statutes are constitutional.

Ohio—[State v. Peoples](#), 102 Ohio St. 3d 460, 2004-Ohio-3923, 812 N.E.2d 963 (2004).

10 U.S.—[Aetna Ins. Co. v. Hyde](#), 275 U.S. 440, 48 S. Ct. 174, 72 L. Ed. 357 (1928).

Mich.—[Shavers v. Kelley](#), 402 Mich. 554, 267 N.W.2d 72 (1978).

As to the showing required, see § 253.

11 Iowa—[ABC Disposal Systems, Inc. v. Department Of Natural Resources](#), 681 N.W.2d 596 (Iowa 2004).

12 N.D.—[Riemers v. Grand Forks Herald](#), 2004 ND 192, 688 N.W.2d 167 (N.D. 2004).

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6. View in Favor of Constitutionality

b. Presumption in Favor of Constitutionality

(1) General Principles

§ 251. Effect of acquiescence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 656, 990

The fact of long acquiescence in the constitutionality of a statute strengthens the usual presumption of constitutionality although it does not make it conclusive.

The presumption in favor of the constitutionality of a statute is especially strong in light of long acquiescence.¹ A universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional.² The continued and unquestioned operation of the statute in question or its predecessors is entitled to weight and is highly persuasive,³ although not conclusive,⁴ of its validity. However, the presumption that statutes are valid does not prevent finding a statute unconstitutional when its invalidity is perceived, notwithstanding the passage of time.⁵

Footnotes

- 1 U.S.—[Life & Casualty Insurance Company of Tennessee v. Barefield](#), 291 U.S. 575, 54 S. Ct. 486, 78 L. Ed. 999 (1934).
- Ind.—[Board of Com'rs of Howard County v. Kokomo City Plan Commission](#), 263 Ind. 282, 330 N.E.2d 92 (1975).
- As to the effect of long acquiescence on a court's power to determine a constitutional issue, see [§ 206](#).
- Settled practice of legislature followed**
- Me.—[Nadeau v. State](#), 395 A.2d 107 (Me. 1978).
- 2 U.S.—[Nevada Com'n on Ethics v. Carrigan](#), 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011); [Republican Party of Minnesota v. White](#), 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).
- 3 Ark.—[South Central Dist. of Pentecostal Church of God of America, Inc. v. Bruce-Rogers Co.](#), 269 Ark. 130, 599 S.W.2d 702 (1980) (abrogated on other grounds by, [Leonards v. E.A. Martin Machinery Co.](#), 321 Ark. 239, 900 S.W.2d 546 (1995)).
- 4 Ark.—[Williams v. State](#), 253 Ark. 973, 490 S.W.2d 117 (1973).
- 5 Md.—[Hope v. Baltimore County](#), 288 Md. 656, 421 A.2d 576 (1980).

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6. View in Favor of Constitutionality

b. Presumption in Favor of Constitutionality

(1) General Principles

§ 252. Exception to presumption of constitutionality in cases involving fundamental rights and suspect classifications

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1020, 1021, 1027

The presumption in favor of constitutionality does not apply where rights, privileges, and immunities of the citizen or suspect classifications are involved and may be reversed when First Amendment or similar rights are concerned.

The usual strong presumption in favor of constitutionality does not apply where rights, privileges, and immunities of citizens are involved¹ or where a classification must meet a strict scrutiny test² because it is inherently suspect.³ This rule is applicable to First Amendment rights.⁴ Under some authority, the usual presumption in favor of constitutionality is merely weaker where the statute arguably inhibits fundamental rights.⁵

When the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded legislative enactments is reversed; the regulations are presumptively invalid, and the government must rebut that presumption.⁶ The

presumption, sometimes characterized as heavy, is against the constitutionality of a statute or governmental action involving a right explicitly or implicitly secured by the Constitution,⁷ including a right secured by the First Amendment.⁸ Moreover, every reasonable presumption against the waiver of fundamental constitutional rights is indulged by the courts,⁹ and they do not presume acquiescence in the loss of fundamental rights.¹⁰

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Footnotes

- 1 U.S.—[Ex parte Mitsuye Endo](#), 323 U.S. 283, 65 S. Ct. 208, 89 L. Ed. 243 (1944).
Minn.—[State v. Benniefield](#), 678 N.W.2d 42 (Minn. 2004).
Wash.—[Adams v. Hinkle](#), 51 Wash. 2d 763, 322 P.2d 844 (1958).
As to privileges and immunities of citizenship, see § 1204.
- Fundamental rights**
- (1) If a law burdens fundamental rights, such as free speech or freedom of religion, any presumption in its favor falls away.
Ariz.—[Gallardo v. State](#), 236 Ariz. 84, 336 P.3d 717, 310 Ed. Law Rep. 1125 (2014).
- (2) Laws that classify on the basis of suspect categories or impinge on fundamental rights expressly or impliedly granted by the constitution are presumed to be unconstitutional unless the State shows the existence of compelling state interests that justify such classifications and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights.
Haw.—[State v. Armitage](#), 132 Haw. 36, 319 P.3d 1044 (2014).
- 2 U.S.—[Parham v. Hughes](#), 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979).
Me.—[State v. Rush](#), 324 A.2d 748 (Me. 1974).
As to strict scrutiny test, see § 1279.
- 3 U.S.—[City of Mobile, Ala. v. Bolden](#), 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980).
Minn.—[State v. Benniefield](#), 678 N.W.2d 42 (Minn. 2004).
As to burden of proof when a classification is suspect, see § 263.
As to the application of the strict scrutiny test to suspect classifications, see § 1275.
- Racial classifications**
- Miss.—[Rias v. Henderson](#), 342 So. 2d 737 (Miss. 1977).
4 U.S.—[U.S. v. Crowthers](#), 456 F.2d 1074 (4th Cir. 1972); [Guajardo v. Estelle](#), 580 F.2d 748 (5th Cir. 1978); [Citizens for a Better Environment v. Village of Schaumburg](#), 590 F.2d 220 (7th Cir. 1978), judgment aff'd, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).
Ark.—[Collins v. State](#), 261 Ark. 195, 548 S.W.2d 106 (1977).
Ga.—[Coleman v. Bradford](#), 238 Ga. 505, 233 S.E.2d 764 (1977).
Mont.—[Montana Auto. Ass'n v. Greely](#), 193 Mont. 378, 632 P.2d 300 (1981).
N.J.—[New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission](#), 82 N.J. 57, 411 A.2d 168 (1980).
Okla.—[State ex rel. Dept. of Transp. v. Pile](#), 1979 OK 152, 603 P.2d 337 (Okla. 1979).
5 Ill.—[In re D.W.](#), 214 Ill. 2d 289, 292 Ill. Dec. 937, 827 N.E.2d 466 (2005).
- Freedom of speech**
- Cal.—[Eller Outdoor Advertising Co. v. Board of Supervisors](#), 89 Cal. App. 3d 76, 152 Cal. Rptr. 358 (1st Dist. 1979).
6 U.S.—[U.S. v. Playboy Entertainment Group, Inc.](#), 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).
Wyo.—[Reiter v. State](#), 2001 WY 116, 36 P.3d 586 (Wyo. 2001).
As to the burden of proof with regard to due process challenges when fundamental rights are affected, see § 262.
- 7 U.S.—[Harris v. McRae](#), 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); [City of Mobile, Ala. v. Bolden](#), 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980).
- Prior restraints**

A scheme imposing licensing requirements on the operation of amusement devices offered to the public in adult entertainment centers created a prior restraint against presumptively protected material and bears a heavy presumption against its constitutionality.

N.D.—[City of Minot v. Central Ave. News, Inc.](#), 308 N.W.2d 851 (N.D. 1981).

8 U.S.—[Capital Cities Media, Inc. v. Toole](#), 463 U.S. 1303, 103 S. Ct. 3524, 77 L. Ed. 2d 1284 (1983).

Colo.—[People ex rel. McKevitt v. Harvey](#), 176 Colo. 447, 491 P.2d 563 (1971).

Kan.—[State ex rel. Londerholm v. Columbia Pictures Corp.](#), 197 Kan. 448, 417 P.2d 255 (1966).

Wash.—[Fine Arts Guild, Inc. v. City of Seattle](#), 74 Wash. 2d 503, 445 P.2d 602 (1968).

9 Ariz.—[State v. McGriff](#), 7 Ariz. App. 498, 441 P.2d 264 (1968).

Ohio—[State v. McCarthy](#), 20 Ohio App. 2d 275, 49 Ohio Op. 2d 364, 253 N.E.2d 789 (8th Dist. Cuyahoga County 1969), judgment aff'd, 26 Ohio St. 2d 87, 55 Ohio Op. 2d 161, 269 N.E.2d 424 (1971).

10 Ohio—[State v. McCarthy](#), 20 Ohio App. 2d 275, 49 Ohio Op. 2d 364, 253 N.E.2d 789 (8th Dist. Cuyahoga County 1969), judgment aff'd, 26 Ohio St. 2d 87, 55 Ohio Op. 2d 161, 269 N.E.2d 424 (1971).

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16 C.J.S. Constitutional Law § 253

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

b. Presumption in Favor of Constitutionality

(1) General Principles

§ 253. Showing required to overcome presumption

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 990, 995, 996, 1004

A court will uphold the constitutionality of a statute unless it clearly appears, or appears beyond a reasonable doubt, that it is in violation of the Constitution.

Proper respect for a coordinate branch of the government requires that the court strike down an act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated.¹ In general, a statute or resolution will be upheld, unless it clearly appears or is shown to be in violation of the Constitution,² or that the legislative branch exceeded its constitutional bounds,³ and if there is any doubt as to whether a challenger has met this high burden, then the court will resolve that doubt in favor of the statute's constitutionality.⁴ The nature of the proof or evidence required to authorize a court to refuse to uphold the constitutionality of a statute has been variously stated as clear and cogent,⁵ clear and convincing,⁶ or a similar term.⁷ Moreover, statutes will be upheld unless they are shown or appear to be unconstitutional beyond doubt or beyond a reasonable doubt.⁸ It must be shown beyond a reasonable doubt that a legislature exceeded its constitutional power.⁹ It is not sufficient for

the challenging party merely to establish doubt about a statute's constitutionality or that a statute probably is unconstitutional.¹⁰ It is also said that a statute should not be declared unconstitutional unless such a conclusion is unavoidable.¹¹

The beyond reasonable doubt¹² or a substantial doubt¹³ standard has been applied when state constitutional provisions are claimed to violate the U.S. Constitution,¹⁴ or an amendment to a state constitution has been ratified by the electorate.¹⁵

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Footnotes

1 U.S.—National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 80 A.L.R. Fed. 2d 501 (2012); Salazar v. Buono, 559 U.S. 700, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010).

2 Ark.—Brown v. State, 2015 Ark. 16, 2015 WL 301449 (2015).

Con.—Cefaratti v. Aranow, 154 Conn. App. 1, 105 A.3d 265 (2014).

Ill.—People v. Mosley, 2015 IL 115872, 2015 WL 728095 (Ill. 2015).

Ind.—Zoeller v. Sweeney, 19 N.E.3d 749 (Ind. 2014).

Kan.—State v. Carr, 300 Kan. 1, 331 P.3d 544 (2014).

Mich.—People v. Temelkoski, 307 Mich. App. 241, 859 N.W.2d 743 (2014).

Mo.—Lewellen v. Franklin, 441 S.W.3d 136 (Mo. 2014).

Neb.—Thompson v. Heineman, 289 Neb. 798, 857 N.W.2d 731 (2015).

Nev.—State v. Hughes, 261 P.3d 1067, 127 Nev. Adv. Op. No. 56 (Nev. 2011).

N.D.—State v. Birchfield, 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).

N.J.—Strategic Environmental Partners, LLC v. New Jersey Dept. of Environmental Protection, 438 N.J. Super. 125, 102 A.3d 939 (App. Div. 2014).

As to the burden of proof, see §§ 259 et seq.

Social and economic legislation

Social and economic legislation carries with it presumption of rationality that can be overcome only by clear showing of arbitrariness and irrationality.

U.S.—Hodel v. Indiana, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981).

3 Wash.—Guillen v. Pierce County, 144 Wash. 2d 696, 31 P.3d 628, 181 A.L.R. Fed. 741 (2001), opinion modified on denial of reconsideration on other grounds, 34 P.3d 1218 (Wash. 2001) and judgment rev'd in part on other grounds, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610, 60 Fed. R. Evid. Serv. 516 (2003).

4 Pa.—Com. v. Thompson, 2014 PA Super 273, 106 A.3d 742 (2014).

5 U.S.—Butler Bros. v. McColgan, 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942).

Cal.—Hoechst Celanese Corp. v. Franchise Tax Bd., 25 Cal. 4th 508, 106 Cal. Rptr. 2d 548, 22 P.3d 324 (2001).

Mass.—General Mills, Inc. v. Commissioner of Revenue, 440 Mass. 154, 795 N.E.2d 552 (2003).

Pa.—Unisys Corp. v. Com., Bd. of Finance & Revenue, 571 Pa. 139, 812 A.2d 448 (2002).

6 Del.—Monceaux v. State, 51 A.3d 474 (Del. 2012).

La.—Louisiana Public Facilities Authority v. Foster, 795 So. 2d 288 (La. 2001).

W. Va.—State ex rel. Haden v. Calco Awning & Window Corp., 153 W. Va. 524, 170 S.E.2d 362 (1969).

Clearly, positively and unmistakably

7 Cal.—People v. Garcia, 230 Cal. App. 4th 763, 178 Cal. Rptr. 3d 883 (3d Dist. 2014), review denied, (Jan. 21, 2015).

Clear and palpable

Ga.—Sentinel Offender SVCS., LLC v. Glover, 296 Ga. 315, 766 S.E.2d 456 (2014).

Va.—Gallagher v. Com., 284 Va. 444, 732 S.E.2d 22 (2012).

Plain, clear, manifest, and unmistakable

Haw.—State v. Alangcas, 2015 WL 518274 (Haw. 2015).

Clearly, unequivocally, and completely

Ky.—Star v. Com., 313 S.W.3d 30 (Ky. 2010).

Palpably and unmistakably

R.I.—Narragansett Indian Tribe v. State, 2015 WL 917921 (R.I. 2015).

- 8 Colo.—[People v. Montgomery](#), 2014 COA 166, 342 P.3d 593 (Colo. App. 2014).
Conn.—[Cefaratti v. Aranow](#), 154 Conn. App. 1, 105 A.3d 265 (2014).
Fla.—[License Acquisitions, LLC v. Debary Real Estate Holdings, LLC](#), 155 So. 3d 1137 (Fla. 2014).
Haw.—[State v. Alangcas](#), 2015 WL 518274 (Haw. 2015).
Idaho—[Rudeen v. Cenarrusa](#), 136 Idaho 560, 38 P.3d 598 (2001).
Ind.—[State v. Lombardo](#), 738 N.E.2d 653 (Ind. 2000).
Iowa—[State v. Baker](#), 688 N.W.2d 250 (Iowa 2004).
Kan.—[State v. Carr](#), 300 Kan. 1, 331 P.3d 544 (2014).
Mich.—[Phillips v. Mirac, Inc.](#), 470 Mich. 415, 685 N.W.2d 174 (2004).
Minn.—[State v. Munger](#), 858 N.W.2d 814 (Minn. Ct. App. 2015).
Miss.—[Houston v. State](#), 150 So. 3d 157 (Miss. Ct. App. 2014).
Mont.—[Malcomson v. Northwest](#), 2014 MT 242, 376 Mont. 306, 339 P.3d 1235 (2014).
N.J.—[In re P.L. 2001, Chapter 362](#), 186 N.J. 368, 895 A.2d 1128 (2006).
N.M.—[State v. Murillo](#), 2015 WL 270053 (N.M. Ct. App. 2015).
N.Y.—[New York State United Teachers ex rel. Iannuzzi v. State](#), 46 Misc. 3d 250, 993 N.Y.S.2d 475, 309 Ed. Law Rep. 1139 (Sup 2014).
N.D.—[State v. Birchfield](#), 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).
Ohio—[Lima v. Stepleton](#), 2013-Ohio-5655, 5 N.E.3d 721 (Ohio Ct. App. 3d Dist. Allen County 2013).
R.I.—[Gem Plumbing & Heating Co., Inc. v. Rossi](#), 867 A.2d 796 (R.I. 2005).
S.C.—[Abbeville County School Dist. v. State](#), 410 S.C. 619, 767 S.E.2d 157, 312 Ed. Law Rep. 917 (2014).
S.D.—[Casazza v. State](#), 2000 SD 120, 616 N.W.2d 872 (S.D. 2000).
Wash.—[In re A.W.](#), 2015 WL 710549 (Wash. 2015).
Wis.—[In re Commitment of Talley](#), 2015 WI App 4, 359 Wis. 2d 522, 859 N.W.2d 155 (Ct. App. 2014).
Wyo.—[Kordus v. Montes](#), 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).
Standard disapproved of
Assessing the constitutionality of a law fundamentally differs from determining the existence of historical facts, the determination of which is subject to deference, and thus, the state supreme court disapproves the use of the "beyond a reasonable doubt" standard for making constitutionality determinations.
Ariz.—[Gallardo v. State](#), 236 Ariz. 84, 336 P.3d 717, 310 Ed. Law Rep. 1125 (2014).
No doubt
S.C.—[Johnson v. Collins Entertainment Co., Inc.](#), 349 S.C. 613, 564 S.E.2d 653 (2002).
9 N.M.—[State ex rel. Public Employees Retirement Ass'n v. Longacre](#), 2002-NMSC-033, 133 N.M. 20, 59 P.3d 500 (2002).
S.D.—[Bergee v. South Dakota Bd. of Pardons and Paroles](#), 2000 SD 35, 608 N.W.2d 636 (S.D. 2000).
W. Va.—[Wampler Foods, Inc. v. Workers' Compensation Div.](#), 216 W. Va. 129, 602 S.E.2d 805 (2004).
10 Wis.—[Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund](#), 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849 (2000).
Iowa—[Stanley v. Southwestern Community College Merged Area \(Merged Area XIV\), in Counties of Adair, et al.](#), 184 N.W.2d 29 (Iowa 1971).
Wash.—[Yelle v. Kramer](#), 83 Wash. 2d 464, 520 P.2d 927 (1974).
12 Haw.—[Watland v. Lingle](#), 104 Haw. 128, 85 P.3d 1079 (2004), as clarified, (Mar. 19, 2004).
13 Kan.—[In re Colorado Interstate Gas Co.](#), 276 Kan. 672, 79 P.3d 770 (2003).
14 Kan.—[In re Colorado Interstate Gas Co.](#), 276 Kan. 672, 79 P.3d 770 (2003).
15 Haw.—[Watland v. Lingle](#), 104 Haw. 128, 85 P.3d 1079 (2004), as clarified, (Mar. 19, 2004).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

b. Presumption in Favor of Constitutionality

(2) Presumptions Relating to Particular Matters

§ 254. Legislature's knowledge and intent

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  999, 1000

As a general rule, it will be presumed that a legislature, in passing a statute, acted with knowledge of the conditions and with the intent to conform to constitutional requirements.

It will be presumed that a legislature, in passing a statute, acted with full knowledge of existing facts and conditions¹ and carefully investigated and properly determined that the interests of the public or public need required the enactment of particular legislation,² the legislative measure rests on some rational basis within the legislature's knowledge and experience,³ and the act is rationally related to achieving a legitimate government objective.⁴ It is also presumed that a legislature had in mind a constitutional purpose rather than an unconstitutional one⁵ and intended to act in a constitutional manner.⁶ The presumption exists that the legislature acted with existing constitutional law in mind,⁷ and the legislature did not intend to violate the Constitution but intended to act within the scope of its lawful powers.⁸ Thus, it will not be presumed that Congress intended

to violate the Fifth Amendment⁹ or the rights to due process and a trial by jury.¹⁰ Instead, the presumption is that a legislature acted with knowledge of constitutional requirements¹¹ and an intent to comply with them,¹² and thus intended to enact a valid, constitutional, and effective statute,¹³ in the absence of definite contrary indications,¹⁴ as where the infringement is apparent from the express purposes or obvious effects of the act.¹⁵

A court presumes a legislative duty to act constitutionally.¹⁶ A legislature will not be presumed to have intended to exercise unconstitutional powers or to pass an unconstitutional law.¹⁷ Also, a legislature is presumed to have acted constitutionally even if the legislative history is otherwise silent.¹⁸

Application to classes of persons.

Where a statute would be unconstitutional as applied to a certain class of persons and is constitutional as applied to others, it is assumed that the legislature intended it to apply only to the latter class,¹⁹ particularly where the statute seems in harmony with the legislature's general purposes.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Under longstanding canons of statutory construction, if one construction would make it possible for a branch of government substantially to enhance its power in relation to another, while the opposite construction would not have such an effect, the principle of checks and balances would be better served by a choice of the latter interpretation. *Morita v. Gorak*, 145 Haw. 385, 453 P.3d 205 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Chesbro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 59 S. Ct. 622, 83 L. Ed. 921 (1939).
Wyo.—*Greenwalt v. Ram Restaurant Corp. of Wyoming*, 2003 WY 77, 71 P.3d 717 (Wyo. 2003).
- 2 U.S.—*Chesbro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 59 S. Ct. 622, 83 L. Ed. 921 (1939).
N.Y.—*Matter of Quinton A.*, 49 N.Y.2d 328, 425 N.Y.S.2d 788, 402 N.E.2d 126 (1980).
N.J.—*Caviglia v. Royal Tours of America*, 178 N.J. 460, 842 A.2d 125 (2004).
Ark.—*City of Siloam Springs v. Benton County*, 350 Ark. 152, 85 S.W.3d 504 (2002).
S.C.—*Powell v. Thomas*, 214 S.C. 376, 52 S.E.2d 782 (1949).
N.J.—*Brown v. Township of Old Bridge*, 319 N.J. Super. 476, 725 A.2d 1154 (App. Div. 1999).
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U.S.—*Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 56 S. Ct. 15, 80 L. Ed. 54 (1935).
Ala.—*Centennial Associates, Ltd. v. Clark*, 384 So. 2d 616 (Ala. 1980).
Ariz.—*Roberts v. Spray*, 71 Ariz. 60, 223 P.2d 808 (1950).
Conn.—*Attrua v. Attrua*, 140 Conn. 73, 98 A.2d 532 (1953).
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N.H.—[State v. Millette](#), 112 N.H. 458, 299 A.2d 150 (1972).

Ohio—[GTE North, Inc. v. Zaino](#), 96 Ohio St. 3d 9, 2002-Ohio-2984, 770 N.E.2d 65 (2002).

Oklahoma—[Swanda v. Swanda](#), 1952 OK 268, 207 Okla. 186, 248 P.2d 575 (1952).

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Tex.—[Smith v. State](#), 2014 WL 5901759 (Tex. App. Corpus Christi 2014).

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Wash.—[Duffy v. State, Dept. of Social and Health Services](#), 90 Wash. 2d 673, 585 P.2d 470 (1978).

W. Va.—[State ex rel. Hughes v. Board of Ed. of Kanawha County](#), 154 W. Va. 107, 174 S.E.2d 711 (1970) (overruled on other grounds by, [Janasiewicz v. Board of Educ. of Kanawha County](#), 171 W. Va. 423, 299 S.E.2d 34, 8 Ed. Law Rep. 864 (1982)).

Congress

A court assumes that, in meeting the oath to uphold the Constitution of the United States, Congress legislates in the light of constitutional limitations.

U.S.—[Al Bahlul v. U.S.](#), 767 F.3d 1 (D.C. Cir. 2014).

9 U.S.—[Anniston Mfg. Co. v. Davis](#), 301 U.S. 337, 57 S. Ct. 816, 81 L. Ed. 1143 (1937).

10 U.S.—[Lipke v. Lederer](#), 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061 (1922).

11 Ga.—[Hamilton v. Renewed Hope, Inc.](#), 277 Ga. 465, 589 S.E.2d 81 (2003).

12 Utah—I.M.L. v. State, 2002 UT 110, 61 P.3d 1038 (Utah 2002).

Iowa—[Hewett Wholesale, Inc. v. Department of Revenue](#), State of Iowa, 343 N.W.2d 487 (Iowa 1984).

Utah—I.M.L. v. State, 2002 UT 110, 61 P.3d 1038 (Utah 2002).

13 U.S.—[Salsburg v. State of Md.](#), 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954).

Ariz.—[Roberts v. Spray](#), 71 Ariz. 60, 223 P.2d 808 (1950).

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Md.—[Marshall v. Director of Finance for Prince George's County](#), 294 Md. 435, 450 A.2d 1300 (1982).

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Ohio—[Barker v. State](#), 62 Ohio St. 2d 35, 16 Ohio Op. 3d 22, 402 N.E.2d 550 (1980).

Or.—[State v. Buck](#), 200 Or. 87, 262 P.2d 495 (1953).

Tenn.—[Tennessee Title Co. v. First Federal Sav. & Loan Ass'n of Nashville](#), Tenn., 185 Tenn. 145, 203 S.W.2d 697 (1947).

Tex.—[State v. Edmond](#), 933 S.W.2d 120 (Tex. Crim. App. 1996).

W. Va.—[City of Huntington v. State Water Commission](#), 135 W. Va. 568, 64 S.E.2d 225 (1951).

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14 U.S.—[American Power & Light Co. v. Securities and Exchange Commission](#), 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).

15 Tex.—[Schooler v. State](#), 175 S.W.2d 664 (Tex. Civ. App. El Paso 1943), writ refused w.o.m., (July 21, 1943).

16 Wyo.—[Appleby v. State ex rel. Wyoming Workers' Safety and Compensation Div.](#), 2002 WY 84, 47 P.3d 613 (Wyo. 2002).

17 U.S.—[Schneiderman v. U.S.](#), 320 U.S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943).

- Fla.—[Bussey v. Legislative Auditing Committee of Legislature](#), 298 So. 2d 219 (Fla. 1st DCA 1974).
- Ga.—[Hamilton v. Renewed Hope, Inc.](#), 277 Ga. 465, 589 S.E.2d 81 (2003).
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- Md.—[Hughes v. State](#), 14 Md. App. 497, 287 A.2d 299 (1972).
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- Pa.—[Bible v. Com., Dept. of Labor and Industry](#), 548 Pa. 247, 696 A.2d 1149 (1997).
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- Wash.—[State ex rel. McLeod v. Reeves](#), 22 Wash. 2d 672, 157 P.2d 718 (1945).
- Wyo.—[Hanson v. Town of Greybull](#), 63 Wyo. 467, 183 P.2d 393 (1947).
- 18 U.S.—[McDonald v. Board of Election Com'rs of Chicago](#), 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969).
- 19 Idaho—[Common School Dist. No. 2 of Nez Perce County v. District No. 1 of Nez Perce County](#), 71 Idaho 192, 227 P.2d 947 (1951).
- Mass.—[Goodwin Bros. Leasing, Inc. v. Nousis](#), 373 Mass. 169, 366 N.E.2d 38 (1977).
- 20 Mass.—[Ferguson v. Commissioner of Corporations and Taxation](#), 316 Mass. 318, 55 N.E.2d 618 (1944).

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16 C.J.S. Constitutional Law § 255

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

6. View in Favor of Constitutionality

b. Presumption in Favor of Constitutionality

(2) Presumptions Relating to Particular Matters

§ 255. Existence of facts supporting validity

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1007

There is a rebuttable presumption that facts and circumstances necessary to the validity of a statute or administrative order exist and that a legislative finding of those facts is correct.

In the context of the requirement that a statute have a reasonable basis in order to be constitutional,¹ a reasonable basis need not be expressly stated by the legislature; a court must uphold legislation as constitutional if it can conceive of facts on which the legislation could reasonably be based,² and if any conceivable legitimate public purpose is apparent on the statute's face or is offered by those defending the enactment, the opponents must disprove the factual basis for the statute.³ The existence of those facts and circumstances will generally be presumed for the purpose of giving validity to the statute⁴ even in the absence of an express finding.⁵ The existence of the requisite facts and circumstances will also be presumed for the purpose of giving

validity to an administrative order⁶ or regulation⁷ if any of those facts may be reasonably conceived in the court's mind.⁸ This rule does not apply if the evidence is to the contrary⁹ or if facts proved or judicially noticed compel a different conclusion.¹⁰

Any finding of fact made by a legislature, essential to the validity of a statute, will be considered presumptively true in the absence of a contradictory showing,¹¹ and may be conclusive,¹² if the court finds any rational basis for the existence of the facts found.¹³ When a statutory classification is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted will be assumed,¹⁴ in the absence of proof or judicial notice to the contrary.¹⁵ Similarly, the Supreme Court must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for that finding.¹⁶

The presumption of the existence of factual conditions¹⁷ or of the correctness of legislative findings¹⁸ supporting legislation is a rebuttable presumption of fact and not a rule of law that makes legislative action invulnerable to constitutional attack, but the challenger must refute every reasonable basis upon which the statute could be found to be constitutional.¹⁹ The presumption that legislation is valid and based on adequate findings is overcome only by proof that precludes the possibility that there could be any set of facts known to the legislature (or which could reasonably be assumed to have been known), which rationally supports the conclusion that a statute is in the public interest.²⁰ In the absence of a factual showing that contravenes the legislative findings, the presumption of constitutionality must prevail.²¹ For instance, legislative declarations of public purpose are presumed valid and should be considered correct unless they are patently erroneous.²²

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Footnotes

- 1 § 1279.
- 2 Wis.—[State v. Radke](#), 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66 (2003).
- 3 Va.—[Willis v. Mullett](#), 263 Va. 653, 561 S.E.2d 705 (2002).
- 4 Alaska—[State v. Niedermeyer](#), 14 P.3d 264 (Alaska 2000).
- 5 U.S.—[Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory](#), 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945).
Ariz.—[State v. Also](#), 11 Ariz. App. 227, 463 P.2d 122 (Div. 1 1969).
Fla.—[Cilento v. State](#), 377 So. 2d 663 (Fla. 1979).
Mass.—[Pinnick v. Cleary](#), 360 Mass. 1, 271 N.E.2d 592, 42 A.L.R.3d 194 (1971).
N.J.—[Burton v. Sills](#), 53 N.J. 86, 248 A.2d 521, 28 A.L.R.3d 829 (1968).
N.C.—[Martin v. North Carolina Housing Corp.](#), 277 N.C. 29, 175 S.E.2d 665 (1970).
R.I.—[State v. Guyette](#), 81 R.I. 281, 102 A.2d 446 (1954).
Cal.—[City of Ojai v. Chaffee](#), 60 Cal. App. 2d 54, 140 P.2d 116 (2d Dist. 1943).
R.I.—[Opinion to the Governor](#), 75 R.I. 54, 63 A.2d 724 (1949).
S.C.—[Bynum v. Barron](#), 227 S.C. 339, 88 S.E.2d 67 (1955).
Wash.—[Hoppe v. State](#), 78 Wash. 2d 164, 469 P.2d 909 (1970).
- 6 U.S.—[Pacific States Box & Basket Co. v. White](#), 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935).
- 7 Colo.—[4-D Bros., Inc. v. Heckers](#), 33 Colo. App. 421, 522 P.2d 749 (App. 1974).
- 8 U.S.—[Pacific States Box & Basket Co. v. White](#), 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935).
Cal.—[Magan Medical Clinic v. California State Bd. of MedicalExaminers](#), 249 Cal. App. 2d 124, 57 Cal. Rptr. 256 (2d Dist. 1967).
Wash.—[Homes Unlimited, Inc. v. City of Seattle](#), 90 Wash. 2d 154, 579 P.2d 1331 (1978).
Wis.—[State v. Interstate Blood Bank, Inc.](#), 65 Wis. 2d 482, 222 N.W.2d 912 (1974).

- 9 U.S.—[Merced Dredging Co. v. Merced County](#), 67 F. Supp. 598 (S.D. Cal. 1946).
10 N.C.—[Martin v. North Carolina Housing Corp.](#), 277 N.C. 29, 175 S.E.2d 665 (1970).
11 U.S.—[Clark v. Paul Gray, Inc.](#), 306 U.S. 583, 59 S. Ct. 744, 83 L. Ed. 1001 (1939).
12 Minn.—[Arens v. Village of Rogers](#), 240 Minn. 386, 61 N.W.2d 508 (1953).
13 N.J.—[Jamouneau v. Harner](#), 16 N.J. 500, 109 A.2d 640 (1954).
14 N.C.—[Martin v. North Carolina Housing Corp.](#), 277 N.C. 29, 175 S.E.2d 665 (1970).
15 Wis.—[Onsrud v. Kenyon](#), 238 Wis. 496, 300 N.W. 359 (1941).
16 Ky.—[Markendorf v. Friedman](#), 280 Ky. 484, 133 S.W.2d 516, 127 A.L.R. 416 (1939).
17 N.J.—[Jamouneau v. Harner](#), 16 N.J. 500, 109 A.2d 640 (1954).
18 Okla.—[Semke v. State ex rel. Oklahoma Motor Vehicle Commission](#), 1970 OK 15, 465 P.2d 441 (Okla. 1970).
19 S.C.—[Bynum v. Barron](#), 227 S.C. 339, 88 S.E.2d 67 (1955).
20 Kan.—[Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson](#), 166 Kan. 78, 200 P.2d 299 (1948).
21 Wis.—[State v. Black Steer Steak House, Inc.](#), 102 Wis. 2d 534, 307 N.W.2d 328 (Ct. App. 1981).
22 Cal.—[Ex parte Fuller](#), 15 Cal. 2d 425, 102 P.2d 321 (1940).
23 Fla.—[City of Tampa v. State ex rel. Evans](#), 155 Fla. 177, 19 So. 2d 697 (1944).
24 U.S.—[Pacific States Box & Basket Co. v. White](#), 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935).
25 Ark.—[Landers v. Jameson](#), 355 Ark. 163, 132 S.W.3d 741, 16 A.L.R.6th 851 (2003).
26 Cal.—[John Tennant Memorial Homes, Inc. v. City of Pacific Grove](#), 27 Cal. App. 3d 372, 103 Cal. Rptr. 215 (1st Dist. 1972).
27 Colo.—[People v. Goodale](#), 78 P.3d 1103 (Colo. 2003).
28 Del.—[Atlantic Richfield Co. v. Tribbitt](#), 399 A.2d 535 (Del. Ch. 1977).
29 Fla.—[Lewis v. Mathis](#), 345 So. 2d 1066 (Fla. 1977).
30 Ga.—[Anderson v. Little & Davenport Funeral Home, Inc.](#), 242 Ga. 751, 251 S.E.2d 250 (1978).
31 Md.—[Massage Parlors, Inc. v. Mayor and City Council of Baltimore](#), 284 Md. 490, 398 A.2d 52 (1979).
32 Mass.—[Com. v. Leis](#), 355 Mass. 189, 243 N.E.2d 898 (1969).
33 N.M.—[Board of Trustees of Town of Las Vegas v. Montano](#), 1971-NMSC-025, 82 N.M. 340, 481 P.2d 702 (1971).
34 Tenn.—[Sandford v. Pearson](#), 190 Tenn. 652, 231 S.W.2d 336 (1950).
35 Wash.—[In re Binding Declaratory Ruling of Dept. of Motor Vehicles](#), 87 Wash. 2d 686, 555 P.2d 1361 (1976).
36 Wis.—[Wisconsin Professional Police Ass'n, Inc. v. Lightbourn](#), 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807 (2001).
37 Wyo.—[Board of County Com'rs of Teton County v. Crow](#), 2003 WY 40, 65 P.3d 720 (Wyo. 2003).
38 As to presumptions regarding the validity of statutory classifications, see § 256.
39 Ill.—[Union Cemetery Ass'n of City of Lincoln v. Cooper](#), 414 Ill. 23, 110 N.E.2d 239 (1953).
40 Minn.—[Arens v. Village of Rogers](#), 240 Minn. 386, 61 N.W.2d 508 (1953).
41 U.S.—[Preseault v. I.C.C.](#), 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990).
42 U.S.—[Borden's Farm Products Co. v. Baldwin](#), 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934).
43 Conn.—[Carroll v. Socony-Vacuum Oil Co.](#), 136 Conn. 49, 68 A.2d 299 (1949).
44 Ky.—[Markendorf v. Friedman](#), 280 Ky. 484, 133 S.W.2d 516, 127 A.L.R. 416 (1939).
45 Wis.—[Ritholz v. Johnson](#), 244 Wis. 494, 12 N.W.2d 738 (1944).
46 Minn.—[State v. Donovan](#), 218 Minn. 606, 16 N.W.2d 897 (1944).
47 Iowa—[State v. Baker](#), 688 N.W.2d 250 (Iowa 2004).
48 N.J.—[State in Interest of J.G.](#), 289 N.J. Super. 575, 674 A.2d 625 (App. Div. 1996), judgment aff'd as modified on other grounds, 151 N.J. 565, 701 A.2d 1260 (1997).
49 Idaho—[Moon v. North Idaho Farmers Ass'n](#), 140 Idaho 536, 96 P.3d 637 (2004).
50 Fla.—[Boschen v. City of Clearwater](#), 777 So. 2d 958 (Fla. 2001).

Public purpose or private benefit

A court must defer to the legislative findings announced in a statute regarding its public purposes unless the plaintiffs make a threshold showing that the findings are evasive and that the purpose of the legislation is principally to benefit private interests.

III.—[Friends of Parks v. Chicago Park Dist.](#), 203 Ill. 2d 312, 271 Ill. Dec. 903, 786 N.E.2d 161 (2003).

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16 C.J.S. Constitutional Law § 256

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§ 256. Classifications

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1020 to 1023

A statutory classification is presumptively valid and reasonable, and is presumed to be based on adequate grounds, and doubts are resolved in its favor.

In the absence of the involvement of a suspect class or an interference with a fundamental right,¹ under the rational basis test, the validity of a statutory or legislative classification is presumed² if there is a rational relationship between the different treatment and some legitimate government interest.³ Legislatures are generally presumed to act within their constitutional powers despite the fact that, in practice, the laws result in some inequality.⁴

The presumption of validity in favor of a statutory classification is a strong one⁵ but is rebuttable and not conclusive.⁶

A presumption will be indulged that in making a classification, the legislature acted in good faith,⁷ for a permissible legislative purpose,⁸ and with full knowledge of existing conditions.⁹

It will be presumed that a legislature acted in response to a reasonable or sound basis for classification and that its differentiation between subjects is based on adequate or legitimate grounds.¹⁰ A statutory discrimination or classification will be upheld if any state of facts reasonably may be conceived to justify it.¹¹ If the validity or reasonableness of a legislative classification is fairly debatable, the legislative judgment controls,¹² and reasonable doubts are resolved in favor of the statute's validity.¹³ However, the general rule that the legislature is presumed to have investigated the facts and that its conclusion is reasonable does not prevail where no reason for the attempted discrimination appears.¹⁴ Before a legislated classification will be held invalid, it must clearly appear to be based on arbitrary distinctions or otherwise capricious, irrational, or unreasonable.¹⁵

Tax laws.

The right to select and classify subjects for taxation being legislative,¹⁶ statutory classifications for purposes of taxation are presumed valid,¹⁷ and state legislatures are presumed to have acted within their constitutional power in this regard¹⁸ unless the contrary is shown.¹⁹ It will be presumed that similar subjects are included within a tax statute and that the statute does not violate the constitutional guarantee of equal protection of the laws by discriminating in favor of one of them.²⁰

General or special laws.

When determining whether a legislative classification is special, and therefore in violation of a state constitutional prohibition against local or special laws, every reasonable presumption must be indulged in favor of the constitutionality of the statute.²¹ Where a state constitution provides that a special act may not be passed, where a general law would be proper and can be made applicable to the case, if a reasonable necessity for a special or local law is apparent or is indicated in the statute, a court will presume that the legislature properly considered the matter, and will not disturb the legislation, unless it clearly appears that a general law would have accomplished the legislative purpose equally as well.²²

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Footnotes

- 1 § 252.
- 2 U.S.—*New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976).
Ala.—*Ex parte State ex rel. Alabama Policy Institute*, 2015 WL 892752 (Ala. 2015).
Ark.—*Brown v. State*, 2015 Ark. 16, 2015 WL 301449 (2015).
Colo.—*Meyer v. Industrial Commission of Colorado*, 644 P.2d 46 (Colo. App. 1981).
Del.—*Mayor and Council of City of Dover v. Kelley*, 327 A.2d 748 (Del. 1974).
Fla.—*City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119 (Fla. 4th DCA 2014).
Ga.—*Young v. State*, 275 Ga. 309, 565 S.E.2d 814 (2002).
Haw.—*State v. Cotton*, 55 Haw. 148, 516 P.2d 715 (1973).
Idaho—*Guzman v. Piercy*, 155 Idaho 928, 318 P.3d 918 (2014).
Iowa—*In re Detention of Williams*, 628 N.W.2d 447 (Iowa 2001).
Kan.—*Barrett ex rel. Barrett v. Unified School Dist. No. 259*, 272 Kan. 250, 32 P.3d 1156, 157 Ed. Law Rep. 917 (2001).
La.—*State v. Fleury*, 799 So. 2d 468 (La. 2001).

Md.—[Massage Parlors, Inc. v. Mayor and City Council of Baltimore](#), 284 Md. 490, 398 A.2d 52 (1979).
Minn.—[Bodin v. City of St. Paul](#), 303 Minn. 555, 227 N.W.2d 794 (1975).
Miss.—[Kohlmeyer & Co. v. Rotwein](#), 186 So. 2d 768 (Miss. 1966).
Mont.—[Small v. McRae](#), 200 Mont. 497, 651 P.2d 982, 6 Ed. Law Rep. 1099 (1982).
Neb.—[Parker v. Roth](#), 202 Neb. 850, 278 N.W.2d 106 (1979).
N.J.—[Peper v. Princeton University Bd. of Trustees](#), 77 N.J. 55, 389 A.2d 465 (1978).
Ohio—[Beatty v. Akron City Hospital](#), 67 Ohio St. 2d 483, 21 Ohio Op. 3d 302, 424 N.E.2d 586 (1981).
Pa.—[In re Keyes](#), 2013 PA Super 326, 83 A.3d 1016 (2013), appeal denied, 101 A.3d 104 (Pa. 2014).
Wash.—[Foundation for the Handicapped v. Department of Social and Health Services of Washington State](#), 97 Wash. 2d 691, 648 P.2d 884 (1982).
W. Va.—[Thomas v. Rutledge](#), 167 W. Va. 487, 280 S.E.2d 123 (1981).
Wis.—[In re Mental Commitment of Mary F.-R.](#), 2013 WI 92, 351 Wis. 2d 273, 839 N.W.2d 581 (2013).

Deference

Rational basis scrutiny is a highly deferential standard, and the court holds legislative acts unconstitutional under a rational basis standard in only the most exceptional of circumstances.

U.S.—[Kentner v. City of Sanibel](#), 750 F.3d 1274 (11th Cir. 2014), cert. denied, 135 S. Ct. 950, 190 L. Ed. 2d 831 (2015).

Deference to classifications

When determining the constitutionality of a statute, the court is required to give deference to classifications contained in the statute and such deference will be observed in all cases where the court cannot say on its judicial knowledge that the legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made.

Fla.—[R.J. Reynolds Tobacco Co. v. Hall](#), 67 So. 3d 1084 (Fla. 1st DCA 2011).

Police power

A statute enacted pursuant to the police power is given a presumption of constitutionality when determining whether it comports with equal protection.

Mich.—[Davey v. Detroit Auto. Inter-Insurance Exchange](#), 414 Mich. 1, 322 N.W.2d 541 (1982).

U.S.—[Vacco v. Quill](#), 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997); [Heller v. Doe by Doe](#), 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); [City of Cleburne, Tex. v. Cleburne Living Center](#), 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Ala.—[Ex parte State ex rel. Alabama Policy Institute](#), 2015 WL 892752 (Ala. 2015).

Alaska—[Treacy v. Municipality of Anchorage](#), 91 P.3d 252 (Alaska 2004).

Ark.—[Brown v. State](#), 2015 Ark. 16, 2015 WL 301449 (2015).

Idaho—[Guzman v. Piercy](#), 155 Idaho 928, 318 P.3d 918 (2014).

Iowa—[Sanchez v. State](#), 692 N.W.2d 812, 16 A.L.R.6th 825 (Iowa 2005).

La.—[State v. Expunged Record \(No.\)](#) 249,044, 881 So. 2d 104 (La. 2004), as clarified on reh'g, (Sept. 24, 2004).

Pa.—[In re Keyes](#), 2013 PA Super 326, 83 A.3d 1016 (2013), appeal denied, 101 A.3d 104 (Pa. 2014).

Minn.—[Kolton v. County of Anoka](#), 645 N.W.2d 403 (Minn. 2002).

Vt.—[In re Picket Fence Preview](#), 173 Vt. 369, 795 A.2d 1242 (2002).

Va.—[Willis v. Mullett](#), 263 Va. 653, 561 S.E.2d 705 (2002).

Wis.—[In re Mental Commitment of Mary F.-R.](#), 2013 WI 92, 351 Wis. 2d 273, 839 N.W.2d 581 (2013).

As to application of the rational basis standard in connection with classifications, see § 1279.

Presumption of rationality

Social and economic legislation that does not employ suspect classifications or impinge on fundamental rights must be upheld against an equal protection attack when legislative means are rationally related to legitimate governmental purpose; that legislation carries with it presumption of rationality.

U.S.—[Hodel v. Indiana](#), 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981).

Kan.—[Barrett ex rel. Barrett v. Unified School Dist. No. 259](#), 272 Kan. 250, 32 P.3d 1156, 157 Ed. Law Rep. 917 (2001).

Neb.—[Big John's Billiards, Inc. v. State](#), 288 Neb. 938, 852 N.W.2d 727 (2014).

Mo.—[Greenlee v. Dukes Plastering Service](#), 75 S.W.3d 273 (Mo. 2002).

Ohio—[GTE North, Inc. v. Zaino](#), 96 Ohio St. 3d 9, 2002-Ohio-2984, 770 N.E.2d 65 (2002).

Cal.—[People v. Pearce](#), 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (2d Dist. 1970).

Ill.—[Szczurek v. City of Park Ridge](#), 97 Ill. App. 3d 649, 52 Ill. Dec. 698, 422 N.E.2d 907 (1st Dist. 1981).

Tenn.—[Knowlton v. Board of Law Examiners of Tennessee](#), 513 S.W.2d 788 (Tenn. 1974).

Wis.—[Wisconsin Professional Police Ass'n, Inc. v. Lightbourn](#), 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807 (2001).

Wyo.—[Greenwalt v. Ram Restaurant Corp. of Wyoming](#), 2003 WY 77, 71 P.3d 717 (Wyo. 2003).

Economic legislation

N.J.—[Chamber of Commerce of U. S. v. State](#), 89 N.J. 131, 445 A.2d 353 (1982).

6 Cal.—[Gutknecht v. City of Sausalito](#), 43 Cal. App. 3d 269, 117 Cal. Rptr. 782 (1st Dist. 1974).

As to the burden of proof on the issue, see § 263.

7 Ala.—[Opinion of the Justices](#), 249 Ala. 511, 31 So. 2d 721 (1947).

Race

Although making decisions based on race is inherently suspect, the good faith of a state legislature must be presumed until it is shown that a classification is based on race.

U.S.—[Miller v. Johnson](#), 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995).

Difference in population

It will be assumed that statutory classification based on a substantial difference in population was adopted in good faith rather than that the classification was arbitrarily fixed.

Ala.—[Dearborn v. Johnson](#), 234 Ala. 84, 173 So. 864 (1937).

Acted conscientiously

Ill.—[Spaulding v. Illinois Community College Bd.](#), 64 Ill. 2d 449, 1 Ill. Dec. 213, 356 N.E.2d 339 (1976).

8 U.S.—[Asbury Hospital v. Cass County, N. D.](#), 326 U.S. 207, 66 S. Ct. 61, 90 L. Ed. 6 (1945).

Ala.—[In re Opinion of the Justices](#), 262 Ala. 345, 81 So. 2d 277 (1955).

9 U.S.—[Arkansas Natural Gas Co. v. Arkansas R. R. Com'n](#), 261 U.S. 379, 43 S. Ct. 387, 67 L. Ed. 705 (1923).

Minn.—[Eldred v. Division of Employment and Sec., Dept. of Social Sec.](#), 209 Minn. 58, 295 N.W. 412 (1940).

Mont.—[City of Billings v. Smith](#), 158 Mont. 197, 490 P.2d 221 (1971).

Wis.—[Hillside Transit Co. v. Larson](#), 265 Wis. 568, 62 N.W.2d 722 (1954).

Inquiry by legislature

In determining the reasonableness of a classification in a statute, it will be presumed that the legislature inquired whether there were evils to be remedied, and the classification was based on that inquiry.

Cal.—[In re Livingston](#), 10 Cal. 2d 730, 76 P.2d 1192 (1938).

10 U.S.—[Ft. Smith Light & Traction Co. v. Board of Imp. of Paving Dist. No. 16 of City of Ft. Smith, Ark.](#), 274 U.S. 387, 47 S. Ct. 595, 71 L. Ed. 1112 (1927).

Mass.—[City of Springfield v. Board of Assessors of Granville](#), 378 Mass. 159, 390 N.E.2d 713 (1979).

Mich.—[City of Detroit, Bd. of Fire Com'rs v. Detroit Fire Fighters Ass'n, Local 344, I. A. F. F.](#), 22 Mich. App. 137, 177 N.W.2d 216 (1970).

Statute formerly held unconstitutional

Where a similar amendment to a statute had been held unconstitutional many years before, a legislature would be presumed to have considered that changed conditions furnished distinct and natural reasons requiring the enactment of a similar statute.

Ky.—[Shannon v. Wheeler](#), 268 Ky. 25, 103 S.W.2d 718 (1937).

11 U.S.—[U.S. v. Maryland Savings-Share Ins. Corp.](#), 400 U.S. 4, 91 S. Ct. 16, 27 L. Ed. 2d 4 (1970).

Ala.—[Howell v. Malone](#), 388 So. 2d 908 (Ala. 1980).

Cal.—[Law School Admission Council, Inc. v. State](#), 222 Cal. App. 4th 1265, 166 Cal. Rptr. 3d 647, 300 Ed. Law Rep. 997 (3d Dist. 2014), as modified, (Feb. 11, 2014) and review denied, (Apr. 16, 2014).

D.C.—[Temporaries Inc. v. District Unemployment Compensation Bd.](#), 304 A.2d 14 (D.C. 1973).

Ill.—[Illinois Housing Development Authority v. Van Meter](#), 82 Ill. 2d 116, 45 Ill. Dec. 18, 412 N.E.2d 151 (1980).

Ind.—[Allen v. Pavach](#), 263 Ind. 574, 335 N.E.2d 219 (1975).

La.—[Detraz v. Fontana](#), 416 So. 2d 1291 (La. 1982).

Mass.—[Massachusetts Public Interest Research Group v. Secretary of Com.](#), 375 Mass. 85, 375 N.E.2d 1175 (1978).

Mo.—[Greenlee v. Dukes Plastering Service](#), 75 S.W.3d 273 (Mo. 2002).

Neb.—[Elliott v. Ehrlich](#), 203 Neb. 790, 280 N.W.2d 637 (1979).

- N.D.—[Tharaldson v. Unsatisfied Judgment Fund](#), 225 N.W.2d 39 (N.D. 1974).
- Ohio—[State v. Williams](#), 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).
- R.I.—[Burrillville Racing Ass'n v. State](#), 118 R.I. 154, 372 A.2d 979 (1977).
- S.C.—[Lee v. South Carolina Dept. of Natural Resources](#), 339 S.C. 463, 530 S.E.2d 112 (2000).
- S.D.—[Crowley v. State](#), 268 N.W.2d 616 (S.D. 1978).
- Tenn.—[Harrison v. Schrader](#), 569 S.W.2d 822 (Tenn. 1978).
- Utah—[Gallivan v. Walker](#), 2002 UT 89, 54 P.3d 1069 (Utah 2002).
- Vt.—[Schievella v. Department of Taxes](#), 171 Vt. 591, 765 A.2d 479 (2000).
- Va.—[Willis v. Mullett](#), 263 Va. 653, 561 S.E.2d 705 (2002).
- Wash.—[Automobile Drivers & Demonstrators Union Local No. 882 v. Department of Retirement Systems](#), 92 Wash. 2d 415, 598 P.2d 379 (1979).
- Wis.—[Ortman v. Jensen & Johnson, Inc.](#), 66 Wis. 2d 508, 225 N.W.2d 635 (1975).
- 12 Cal.—[Carlin v. City of Palm Springs](#), 14 Cal. App. 3d 706, 92 Cal. Rptr. 535 (4th Dist. 1971).
- Ill.—[Schilb v. Kuebel](#), 46 Ill. 2d 538, 264 N.E.2d 377 (1970), judgment aff'd, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971).
- Iowa—[Kasperek v. Johnson County Bd. of Health](#), 288 N.W.2d 511 (Iowa 1980).
- Tenn.—[Stalcup v. City of Gatlinburg](#), 577 S.W.2d 439 (Tenn. 1978).
- Va.—[Estes Funeral Home v. Adkins](#), 266 Va. 297, 586 S.E.2d 162 (2003).
- 13 Wyo.—[Greenwalt v. Ram Restaurant Corp. of Wyoming](#), 2003 WY 77, 71 P.3d 717 (Wyo. 2003).
- 14 Cal.—[Sei Fujii v. State](#), 38 Cal. 2d 718, 242 P.2d 617 (1952).
- Iowa—[May's Drug Stores v. State Tax Commission](#), 242 Iowa 319, 45 N.W.2d 245 (1950).
- 15 U.S.—[Bayside Fish Flour Co. v. Gentry](#), 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936).
- Colo.—[People v. Goodale](#), 78 P.3d 1103 (Colo. 2003).
- Iowa—[In re Detention of Williams](#), 628 N.W.2d 447 (Iowa 2001).
- Mass.—[Shea v. Boston Edison Co.](#), 431 Mass. 251, 727 N.E.2d 41 (2000).
- Minn.—[Bodin v. City of St. Paul](#), 303 Minn. 555, 227 N.W.2d 794 (1975).
- 16 Okla.—[Fent v. State ex rel. Oklahoma Tax Com'n](#), 2004 OK 59, 99 P.3d 241 (Okla. 2004).
- 17 Ill.—[Williams v. City of Chicago](#), 66 Ill. 2d 423, 6 Ill. Dec. 208, 362 N.E.2d 1030 (1977).
- Miss.—[Harris v. Harrison County Bd. of Supervisors](#), 366 So. 2d 651 (Miss. 1979).
- Mass.—[Frost v. Commissioner of Corporations & Taxation](#), 363 Mass. 235, 293 N.E.2d 862 (1973).
- N.Y.—[Miriam Osborn Memorial Home Ass'n v. Chassin](#), 100 N.Y.2d 544, 762 N.Y.S.2d 867, 793 N.E.2d 404 (2003).
- Okla.—[Fent v. State ex rel. Oklahoma Tax Com'n](#), 2004 OK 59, 99 P.3d 241 (Okla. 2004).
- S.C.—[Holzwasser v. Brady](#), 262 S.C. 481, 205 S.E.2d 701 (1974).

Strength of presumption

Legislative classifications are presumed valid, and where a tax measure is involved, the presumption of constitutionality is the strongest.

Wis.—[Thompson v. Kenosha County](#), 64 Wis. 2d 673, 221 N.W.2d 845 (1974).

18 Mont.—[Kottel v. State](#), 2002 MT 278, 312 Mont. 387, 60 P.3d 403 (2002).

Mich.—[Walter Toebe & Co. v. Michigan Dept. of Revenue](#), 378 Mich. 617, 148 N.W.2d 775 (1967).

20 U.S.—[Charleston Federal Sav. & Loan Ass'n v. Alderson](#), 324 U.S. 182, 65 S. Ct. 624, 89 L. Ed. 857 (1945).

21 Ind.—[Williams v. State](#), 724 N.E.2d 1070 (Ind. 2000).

22 W. Va.—[Gallant v. County Com'n of Jefferson County](#), 212 W. Va. 612, 575 S.E.2d 222 (2002).

Legislative discretion

A court will not overrule the legislature's judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion.

S.C.—[Kizer v. Clark](#), 360 S.C. 86, 600 S.E.2d 529 (2004).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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(2) Presumptions Relating to Particular Matters

§ 257. Administration of statute

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1007

There is a presumption that a statute will be administered so as to render its application valid.

It is generally presumed, in determining the constitutionality of a statute, that it will be so interpreted and administered as to render its application valid.¹ It must be assumed that the officials involved will act in accordance with the provisions of the law,² will obey the laws and the constitution,³ and will properly interpret and construe the provisions of the statute.⁴ Thus, it is presumed that prosecutors will consider the purpose of a juvenile court act when making decisions whether to refer cases to the adult courts.⁵ On the other hand, the U.S. Supreme Court, in passing on the constitutionality of a state alcoholic beverage control law, would not presume that the agency administering the state statute would not exercise its discretion to alleviate any friction with federal statutes.⁶

It will also be assumed that the officials will enforce a statute according to its plain terms⁷ and not in an unconstitutional or illegal manner.⁸ However, absent any statute authorizing a particular type of regulation, a local regulation is not entitled to a presumption that it is valid.⁹

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Footnotes

1 U.S.—[American Power & Light Co. v. Securities and Exchange Commission](#), 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946); [Yakus v. U. S.](#), 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

Ala.—[Heck v. Hall](#), 238 Ala. 274, 190 So. 280 (1939).

Cal.—[Alameda County v. Janssen](#), 16 Cal. 2d 276, 106 P.2d 11, 130 A.L.R. 1141 (1940).

Del.—[Darling Apartment Co. v. Springer](#), 25 Del. Ch. 420, 22 A.2d 397, 137 A.L.R. 803 (1941).

Ky.—[Young v. Willis](#), 305 Ky. 201, 203 S.W.2d 5 (1947).

Mass.—[Marshal House, Inc. v. Rent Control Bd. of Brookline](#), 358 Mass. 686, 266 N.E.2d 876 (1971).

Wash.—[Campbell v. State](#), 12 Wash. 2d 459, 122 P.2d 458 (1942).

2 Ky.—[Young v. Willis](#), 305 Ky. 201, 203 S.W.2d 5 (1947).

3 Tenn.—[State ex rel. Gallaher v. Hickman](#), 190 Tenn. 310, 229 S.W.2d 495 (1950).

Compliance with state and federal constitutions

Tenn.—[Estrin v. Moss](#), 221 Tenn. 657, 430 S.W.2d 345 (1968).

Rules for practice of dentistry

It is not presumed that agency will adopt rules for practice of dentistry that do not meet test of constitutionality.

Mich.—[Toole v. Michigan State Board of Dentistry](#), 306 Mich. 527, 11 N.W.2d 229 (1943).

Ala.—[Heck v. Hall](#), 238 Ala. 274, 190 So. 280 (1939).

Ill.—[People v. Handley](#), 51 Ill. 2d 229, 282 N.E.2d 131 (1972).

6 U.S.—[Joseph E. Seagram & Sons, Inc. v. Hostetter](#), 384 U.S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336 (1966) (abrogated on other grounds by, [Healy v. Beer Institute, Inc.](#), 491 U.S. 324, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)).

7 U.S.—[Joyce v. U.S.](#), 454 F.2d 971 (D.C. Cir. 1971).

8 U.S.—[United Health Clubs of America, Inc. v. Strom](#), 423 F. Supp. 761 (D.S.C. 1976).

County regulation of liquor licensees

Neb.—[DLH, Inc. v. Lancaster County Bd. of Com'rs](#), 264 Neb. 358, 648 N.W.2d 277 (2002).

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(2) Presumptions Relating to Particular Matters

§ 258. Other matters

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West's Key Number Digest

West's Key Number Digest, Constitutional Law  1007 to 1019, 1023

Presumptions in favor of the constitutionality of statutes include those relating to the exercise of legislative discretion and compliance with a single subject rule.

In determining the constitutionality of statutes, numerous assumptions or presumptions as to particular matters have been made, including that legislative discretion has been properly exercised,¹ a statute having a reasonable relationship to its stated purpose of promoting public safety or welfare is constitutional,² legislative acts adjusting the burdens and benefits of economic life are constitutional,³ a legislative judgment that is not only consistent with the dominant opinion throughout the country but is also in accord with tradition is entitled to a powerful presumption of validity when challenged on due process grounds,⁴ and a legislature would vest in an administrative agency only duties that are within the purview of the agency's constitutional authority.⁵ Any reasonable doubt whether a title of an act complies with a state constitutional requirement that the subject of every bill must be expressed in the title⁶ or that an act violates a single subject clause of a state constitution⁷ is resolved in

accordance with a presumption in favor of constitutionality⁸ although judicial review of legislation is not so deferential as to effectively negate a single subject provision of a state constitution.⁹

Courts do not presume the unconstitutionality of federal criminal statutes lacking an explicit reference to a power of Congress enumerated in the Constitution, such as a connection with federal money so as to invoke the Spending Clause,¹⁰ and there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest cognizable under that clause.¹¹

While the presumption of constitutional validity applies in some states where a claim is made that a public education clause of a state constitution has been violated,¹² under another state constitution, legislation dealing with school finance is not entitled to a presumption of constitutionality and must withstand a strict scrutiny test.¹³

In reviewing taxation laws, courts indulge a strong presumption of constitutional validity.¹⁴ A tax statute's presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.¹⁵

A court presumes the validity of a statute challenged as unconstitutionally vague.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Canon of constitutional doubt did not apply to interpretation of statute governing excess proceeds from a municipality's sale of property acquired via tax deed, despite concern that the statutory procedure might be an unconstitutional taking, where express terms of the statute stated that former owner could not recover excess proceeds from a municipality after three-year period has elapsed. N.H. Const. pt. I, art. 12; [N.H. Rev. Stat. Ann. § 80:89. Polonsky v. Town of Bedford](#), 190 A.3d 400 (N.H. 2018).

[END OF SUPPLEMENT]

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Footnotes

1 Ark.—[Board of Com'rs of Red River Bridge Dist. v. Wood](#), 183 Ark. 1082, 40 S.W.2d 435 (1931).
Idaho—[Rowe v. City of Pocatello](#), 70 Idaho 343, 218 P.2d 695 (1950).

2 Ky.—[Chambers v. Stengel](#), 37 S.W.3d 741 (Ky. 2001).

N.J.—[State v. Lenihan](#), 219 N.J. 251, 98 A.3d 533 (2014).

Wash.—[State v. Glas](#), 147 Wash. 2d 410, 54 P.3d 147 (2002).

3 U.S.—[Pension Ben. Guar. Corp. v. R.A. Gray & Co.](#), 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).
Ky.—[Holbrook v. Lexmark Intern. ¥Group, Inc.](#), 65 S.W.3d 908 (Ky. 2001), as modified on denial of reh'g, (Feb. 21, 2002).

Price and rent controls

Determining regulated prices or rent that will provide a fair return, as would satisfy the Due Process Clause, involves a balancing of investor and consumer interests; it is the product of expert judgment, which carries a presumption of validity.

Cal.—[Galland v. City of Clovis](#), 24 Cal. 4th 1003, 103 Cal. Rptr. 2d 711, 16 P.3d 130 (2001), as modified, (Mar. 21, 2001).

Use of property

When a party contests the validity of an ordinance regulating an activity (in this case, automobile racing) on the plaintiff's premises, the appropriate inquiry is whether the claimant has proved that the ordinance constitutes a restriction on property rights that is not rationally related to the town's legitimate goals; under this standard, there is a presumption favoring the constitutionality of the regulation, and in determining the validity of the municipal ordinance, its reasonableness will be presumed.

N.H.—[Dow v. Town of Effingham](#), 148 N.H. 121, 803 A.2d 1059 (2002).

4 U.S.—[Rivera v. Minnich](#), 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987).

5 Okla.—[Oklahoma Gas & Elec. Co. v. Corporation Commission](#), 1975 OK 15, 543 P.2d 546 (Okla. 1975).

6 Wash.—[Retired Public Employees Council of Washington v. Charles](#), 148 Wash. 2d 602, 62 P.3d 470 (2003).

7 Fla.—[Franklin v. State](#), 887 So. 2d 1063 (Fla. 2004).

8 Fla.—[Franklin v. State](#), 887 So. 2d 1063 (Fla. 2004).

9 Wash.—[Retired Public Employees Council of Washington v. Charles](#), 148 Wash. 2d 602, 62 P.3d 470 (2003).

10 Ohio—[State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.](#), 104 Ohio St. 3d 122, 2004-Ohio-6363, 818 N.E.2d 688 (2004).

11 U.S. Const. Art. I, § 8, cl. 1.

12 U.S.—[Sabri v. U.S.](#), 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891, 5 A.L.R. Fed. 2d 821 (2004).

13 Mass.—[Hancock v. Commissioner of Educ.](#), 443 Mass. 428, 822 N.E.2d 1134, 195 Ed. Law Rep. 591 (2005).

14 Wyo.—[State v. Campbell County School Dist.](#), 2001 WY 19, 19 P.3d 518, 151 Ed. Law Rep. 634 (Wyo. 2001), on reh'g on other grounds, 2001 WY 90, 32 P.3d 325, 157 Ed. Law Rep. 366 (Wyo. 2001).

15 La.—[Pine Prairie Energy Center, LLC v. Soileau](#), 141 So. 3d 367 (La. Ct. App. 3d Cir. 2014), writ denied, 152 So. 3d 177 (La. 2014).

16 Tex.—[Texas Entertainment Ass'n, Inc. v. Combs](#), 431 S.W.3d 790 (Tex. App. Austin 2014), reh'g overruled, (June 2, 2014) and review denied, (Nov. 21, 2014) and cert. denied, 2015 WL 515987 (U.S. 2015).

Nev.—[Deja Vu Showgirls v. State, Dept. of Tax.](#), 334 P.3d 392, 130 Nev. Adv. Op. No. 73 (Nev. 2014).

15 U.S.—[U.S. v. Ghane](#), 673 F.3d 771, 87 Fed. R. Evid. Serv. 1193 (8th Cir. 2012).

Conn.—[State v. DeCicco](#), 315 Conn. 79, 105 A.3d 165 (2014).

Iowa—[State v. Showens](#), 845 N.W.2d 436 (Iowa 2014).

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(3) Burden of Proof

§ 259. Who has burden of overcoming presumption of constitutionality of law

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1030 to 1033

The party attacking a statute or administrative action that has been accorded a presumption of constitutionality has the burden of overcoming the presumption and of proving that the action is unconstitutional beyond a reasonable doubt.

The party attacking a statute, regulation, or administrative decision that has been accorded a presumption of constitutionality¹ has the burden of demonstrating that the government action at issue is unconstitutional.² This burden is a heavy one,³ and the challenger bears the burden of showing unconstitutionality beyond a reasonable doubt.⁴ Some courts have stated that this is an initial burden,⁵ and if the challenging party is able to show the act is invalid, leaving no room for reasonable doubt that it violates some provision of the Constitution, then the burden shifts to the State.⁶ However, the general rule governing the burden of proof does not apply where, without the necessity of extraneous evidence, it appears from the language of the statute itself

that it transgresses some constitutional provision.⁷ Also, where fundamental rights are involved, and there is no presumption of validity,⁸ the government has the burden of proving beyond a reasonable doubt that the statute is constitutional.⁹

The party who challenges a statute's constitutionality has the burden of proving specific constitutional infirmities¹⁰ or that it violates an identifiable aspect of the state or the United States Constitution.¹¹

The burden of showing the invalidity of a constitutional amendment that has been ratified by the electorate is upon the party challenging the results of the election.¹²

CUMULATIVE SUPPLEMENT

Cases:

The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations. [Rebman v. Parson](#), 576 S.W.3d 605 (Mo. 2019), opinion modified and superseded on reh'g, (June 25, 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 §§ 249 et seq.
- 2 U.S.—[Lujan v. G & G Fire Sprinklers, Inc.](#), 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001); [Usery v. Turner Elkhorn Mining Co.](#), 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976).
Ala.—[Bynum v. City of Oneonta](#), 2015 WL 836700 (Ala. 2015).
Alaska—[Harris v. Millenium Hotel](#), 330 P.3d 330 (Alaska 2014).
Ark.—[Brown v. State](#), 2015 Ark. 16, 2015 WL 301449 (2015).
Colo.—[People v. Montgomery](#), 2014 COA 166, 342 P.3d 593 (Colo. App. 2014).
Conn.—[In re Shane M.](#), 148 Conn. App. 308, 84 A.3d 1265 (2014), certification granted in part, [311 Conn. 930](#), 86 A.3d 1056 (2014).
Del.—[Helman v. State](#), 784 A.2d 1058 (Del. 2001).
Ga.—[Union County v. CGP, Inc.](#), 277 Ga. 349, 589 S.E.2d 240 (2003).
Haw.—[State v. Alangcas](#), 2015 WL 518274 (Haw. 2015).
Idaho—[Guzman v. Piercy](#), 155 Idaho 928, 318 P.3d 918 (2014).
Ill.—[Bartlow v. Costigan](#), 2014 IL 115152, 383 Ill. Dec. 95, 13 N.E.3d 1216 (Ill. 2014), as modified on denial of reh'g, (May 27, 2014) and cert. denied, 135 S. Ct. 377, 190 L. Ed. 2d 254 (2014).
Ind.—[Zoeller v. Sweeney](#), 19 N.E.3d 749 (Ind. 2014).
Iowa—[Star Equipment, Ltd. v. State, Iowa Dept. of Transp.](#), 843 N.W.2d 446 (Iowa 2014).
Kan.—[State v. Cheeks](#), 298 Kan. 1, 310 P.3d 346 (2013).
La.—[Louisiana Federation of Teachers v. State](#), 201 L.R.R.M. (BNA) 3694, 2014 WL 5287248 (La. 2014).
Mass.—[Com. v. Caetano](#), 26 N.E.3d 688 (Mass. 2015).
Me.—[Doe v. Anderson](#), 2015 ME 3, 108 A.3d 378 (Me. 2015).
Md.—[Beattie v. State](#), 216 Md. App. 667, 88 A.3d 906 (2014).
Mich.—[People v. Harris](#), 495 Mich. 120, 845 N.W.2d 477 (2014).
Minn.—[State v. Munger](#), 858 N.W.2d 814 (Minn. Ct. App. 2015).
Mont.—[State v. Ring](#), 2014 MT 49, 374 Mont. 109, 321 P.3d 800 (2014).
Mo.—[Lewellen v. Franklin](#), 441 S.W.3d 136 (Mo. 2014).

- Neb.—[Big John's Billiards, Inc. v. State](#), 288 Neb. 938, 852 N.W.2d 727 (2014).
Nev.—[Zahavi v. State](#), 343 P.3d 595, 131 Nev. Adv. Op. No. 7 (Nev. 2015).
N.H.—[Doe v. State](#), 2015 WL 575847 (N.H. 2015).
N.J.—[State v. Lenihan](#), 219 N.J. 251, 98 A.3d 533 (2014).
N.M.—[Pinghua Zhao v. Montoya](#), 2014-NMSC-025, 329 P.3d 676 (N.M. 2014).
N.Y.—[Becker v. Shapiro](#), 110 A.D.3d 874, 975 N.Y.S.2d 62 (2d Dep't 2013).
N.D.—[State v. Birchfield](#), 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).
Okla.—[Tulsa Stockyards, Inc. v. Clark](#), 2014 OK 14, 321 P.3d 185 (Okla. 2014).
Pa.—[Friends of Pennsylvania Leadership Charter School v. Chester County Bd. of Assessment Appeals](#), 101 A.3d 66, 310 Ed. Law Rep. 1007 (Pa. 2014).
S.C.—[In re Stephen W.](#), 409 S.C. 73, 761 S.E.2d 231 (2014).
S.D.—[State v. Berget](#), 2014 SD 61, 853 N.W.2d 45 (S.D. 2014), cert. denied, 135 S. Ct. 1505 (2015).
Tex.—[Union Carbide Corp. v. Synatzske](#), 438 S.W.3d 39 (Tex. 2014).
R.I.—[Gem Plumbing & Heating Co., Inc. v. Rossi](#), 867 A.2d 796 (R.I. 2005).
S.C.—[In re Treatment and Care of Luckabaugh](#), 351 S.C. 122, 568 S.E.2d 338 (2002).
Utah—[State v. Roberts](#), 2015 UT 24, 2015 WL 404627 (Utah 2015).
Va.—[Finn v. Virginia Retirement System](#), 259 Va. 144, 524 S.E.2d 125 (2000).
Wash.—[Association of Washington Spirits and Wine Distributors v. Washington State Liquor Control Bd.](#), 182 Wash. 2d 342, 340 P.3d 849 (2015).
Wis.—[In re Commitment of Alger](#), 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346 (2015).
Wyo.—[Kordus v. Montes](#), 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).

Burden not on state

The Commonwealth does not bear the burden of establishing the constitutionality of a statute; rather, the person who questions the validity of an act bears the burden to sustain that contention.

- Ky.—[Cornelison v. Com.](#), 52 S.W.3d 570 (Ky. 2001).
U.S.—[McCullen v. Coakley](#), 571 F.3d 167, 62 A.L.R.6th 739 (1st Cir. 2009).
Ark.—[Eady v. Lansford](#), 351 Ark. 249, 92 S.W.3d 57 (2002).
Cal.—[Pacific Legal Foundation v. Brown](#), 29 Cal. 3d 168, 172 Cal. Rptr. 487, 624 P.2d 1215 (1981).
Colo.—[People v. Vasquez](#), 84 P.3d 1019 (Colo. 2004).
Conn.—[In re Shane M.](#), 148 Conn. App. 308, 84 A.3d 1265 (2014), certification granted in part, 311 Conn. 930, 86 A.3d 1056 (2014).
D.C.—[U. S. v. Thorne](#), 325 A.2d 764 (D.C. 1974).
Ind.—[Steup v. Indiana Housing Finance Authority](#), 273 Ind. 72, 402 N.E.2d 1215 (1980).
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Mass.—[Com. v. Caetano](#), 26 N.E.3d 688 (Mass. 2015).
Me.—[State v. S. S. Kresge, Inc.](#), 364 A.2d 868 (Me. 1976).
Md.—[Storch v. Zoning Bd. of Howard County](#), 267 Md. 476, 298 A.2d 8 (1972).
Mass.—[Pielech v. Massasoit Greyhound, Inc.](#), 441 Mass. 188, 804 N.E.2d 894 (2004).
Minn.—[State v. Tennin](#), 674 N.W.2d 403 (Minn. 2004).
Mo.—[Etling v. Westport Heating & Cooling Services, Inc.](#), 92 S.W.3d 771 (Mo. 2003).
Mont.—[Matter of Kujath's Estate](#), 169 Mont. 128, 545 P.2d 662 (1976).
N.Y.—[People v. Foley](#), 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000).
Okla.—[Tulsa Stockyards, Inc. v. Clark](#), 2014 OK 14, 321 P.3d 185 (Okla. 2014).
Pa.—[Ieropoli v. AC&S Corp.](#), 577 Pa. 138, 842 A.2d 919 (2004).
Tenn.—[Gallaher v. Elam](#), 104 S.W.3d 455 (Tenn. 2003).
Utah—[Jones v. Utah Board of Pardons & Parole](#), 2004 UT 53, 94 P.3d 283 (Utah 2004).
Vt.—[In re Montpelier & Barre R. R. Corp.](#), 135 Vt. 102, 369 A.2d 1379 (1977).
Wash.—[Washington State Grange v. Locke](#), 153 Wash. 2d 475, 105 P.3d 9 (2005).
Wis.—[In re Commitment of Alger](#), 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346 (2015).
Wyo.—[Woods v. Wells Fargo Bank Wyoming](#), 2004 WY 61, 90 P.3d 724 (Wyo. 2004).

Code of professional responsibility for attorneys

An attorney attacking the constitutionality of an ethical consideration assumes a heavy burden in overcoming the presumption of constitutionality.

Iowa—Committee on Professional Ethics and Conduct of State Bar Ass'n v. Behnke, 276 N.W.2d 838 (Iowa 1979).

4 Ala.—Alabama Alcoholic Beverage Control Bd. v. City of Pelham, 855 So. 2d 1070 (Ala. 2003).

Colo.—People v. Montgomery, 2014 COA 166, 342 P.3d 593 (Colo. App. 2014).

Conn.—In re Shane M., 148 Conn. App. 308, 84 A.3d 1265 (2014), certification granted in part, 311 Conn. 930, 86 A.3d 1056 (2014).

Haw.—State v. Alangcas, 2015 WL 518274 (Haw. 2015).

Iowa—Star Equipment, Ltd. v. State, Iowa Dept. of Transp., 843 N.W.2d 446 (Iowa 2014).

Mass.—Pielech v. Massasoit Greyhound, Inc., 441 Mass. 188, 804 N.E.2d 894 (2004).

Minn.—State v. Munger, 858 N.W.2d 814 (Minn. Ct. App. 2015).

Miss.—Edwards v. State, 800 So. 2d 454 (Miss. 2001).

Mont.—State v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800 (2014).

N.Y.—Becker v. Shapiro, 110 A.D.3d 874, 975 N.Y.S.2d 62 (2d Dep't 2013).

Ohio—Yajnik v. Akron Dept. of Health, Hous. Div., 101 Ohio St. 3d 106, 2004-Ohio-357, 802 N.E.2d 632 (2004).

Oklahoma—State v. Howerton, 2002 OK CR 17, 46 P.3d 154 (Okla. Crim. App. 2002).

R.I.—Gem Plumbing & Heating Co., Inc. v. Rossi, 867 A.2d 796 (R.I. 2005).

S.D.—State v. Berget, 2014 SD 61, 853 N.W.2d 45 (S.D. 2014), cert. denied, 135 S. Ct. 1505 (2015).

Wash.—State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp., 142 Wash. 2d 328, 12 P.3d 134 (2000).

Wis.—State v. Cole, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (2003).

Wyo.—Kordus v. Montes, 2014 WY 146, 337 P.3d 1138 (Wyo. 2014).

As to the showing required to overcome the presumption, see § 253.

Vagueness challenge

A party challenging a statute's constitutionality on vagueness grounds has the burden of proving its vagueness beyond a reasonable doubt.

Wash.—Davis v. Cox, 180 Wash. App. 514, 325 P.3d 255 (Div. 1 2014), review granted, 182 Wash. 2d 1008 (2014).

5 N.Y.—LaValle v. Hayden, 98 N.Y.2d 155, 746 N.Y.S.2d 125, 773 N.E.2d 490, 168 Ed. Law Rep. 438 (2002).

S.C.—State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002).

6 S.C.—State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002).

Commerce Clause challenge

The party challenging the validity of a state statute on Federal Commerce Clause grounds commonly bears the burden of proof, but if a statute, on its face or in practical effect, discriminates against interstate commerce, the burden shifts to the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

N.J.—American Trucking Associations, Inc. v. State, 180 N.J. 377, 852 A.2d 142 (2004).

7 Mo.—McKay Buick, Inc. v. Love, 569 S.W.2d 740 (Mo. 1978).

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8 Wis.—State v. Jadowski, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810 (2004).

9 La.—Huber v. Midkiff, 838 So. 2d 771 (La. 2003).

10 R.I.—In re Christopher S., 776 A.2d 1054 (R.I. 2001).

11 Haw.—Watland v. Lingle, 104 Haw. 128, 85 P.3d 1079 (2004), as clarified, (Mar. 19, 2004).

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§ 260. Facial and overbreadth challenges

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  1032 to 1034

An especially heavy burden is imposed on litigants making facial challenges to a statute.

A litigant making a facial challenge to the constitutionality of a statute bears a substantial¹ or heavy² burden since the challenger must usually establish that no set of circumstances exists under which the act would be valid³ or that the statute lacks any plainly legitimate sweep.⁴ Claimants bear a heavy burden in advancing a facial challenge to a statute on First Amendment grounds and, to prevail, must demonstrate a substantial risk that the application of the statutory provision will lead to the suppression of speech.⁵

A litigant who claims that a statute is overbroad bears the burden of demonstrating, from the text of law and fact, that substantial overbreadth exists⁶ unless substantial First Amendment rights are involved.⁷

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Footnotes

- 1 N.Y.—[Moran Towing Corp. v. Urbach](#), 99 N.Y.2d 443, 757 N.Y.S.2d 513, 787 N.E.2d 624 (2003).
- 2 U.S.—[Whole Woman's Health v. Lakey](#), 769 F.3d 285 (5th Cir. 2014); [Fieger v. Michigan Supreme Court](#), 553 F.3d 955 (6th Cir. 2009).
- 3 Conn.—[State v. Ball](#), 260 Conn. 275, 796 A.2d 542 (2002).
- U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); [U.S. v. Salerno](#), 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).
- Iowa—[State v. Hernandez-Lopez](#), 639 N.W.2d 226 (Iowa 2002).
- Kan.—[State v. Watson](#), 273 Kan. 426, 44 P.3d 357 (2002).
- N.Y.—[Moran Towing Corp. v. Urbach](#), 99 N.Y.2d 443, 757 N.Y.S.2d 513, 787 N.E.2d 624 (2003).
- As to the scope of the inquiry when a statute is challenged on its face, see § 243.
- 4 U.S.—[U.S. v. Stevens](#), 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).
- 5 U.S.—[National Endowment for the Arts v. Finley](#), 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).
- 6 U.S.—[Virginia v. Hicks](#), 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).
- S.D.—[State v. Asmussen](#), 2003 SD 102, 668 N.W.2d 725 (S.D. 2003).
- 7 Wyo.—[Rutti v. State](#), 2004 WY 133, 100 P.3d 394 (Wyo. 2004).

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§ 261. Rational basis

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1033 to 1038, 1040

Under a rational basis test, the burden is on the person asserting that a statute is unconstitutional to negate any conceivable basis for upholding the statute.

Since, under the rational basis test,¹ legislation is presumed constitutional and rationally related to achieving any legitimate governmental objective under any reasonably conceivable fact situation,² the burden of proof is on the party challenging the legislation to prove its unconstitutionality.³ A challenger has the burden to negate every reasonable basis of sustaining the statute's constitutionality,⁴ and to demonstrate that there is no conceivable basis to justify the legislation,⁵ or negate every conceivable basis which might support the statute,⁶ by proving that the act is not rationally related to achieving any legitimate government objective under any reasonably conceivable state of facts.⁷ The attack will fail if the court determines, after applying

this burden of proof, that a reasonable relationship exists between the law and the promotion or protection of public health, safety, or welfare.⁸

CUMULATIVE SUPPLEMENT

Cases:

To survive rational basis review for a constitutional violation, a state law need only be rationally related to legitimate government interests. [Box v. Planned Parenthood of Indiana and Kentucky, Inc.](#), 139 S. Ct. 1780 (2019).

Given the standard of review, it should come as no surprise that courts hardly ever strike down a policy as illegitimate under rational basis scrutiny for a constitutional violation. [Trump v. Hawaii](#), 138 S. Ct. 2392 (2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 § 1279.
- 2 § 255.
- 3 Ark.—[Eady v. Lansford](#), 351 Ark. 249, 92 S.W.3d 57 (2002).
- 4 N.J.—[Caviglia v. Royal Tours of America](#), 178 N.J. 460, 842 A.2d 125 (2004).
- 5 Ala.—[Duran v. Buckner](#), 157 So. 3d 956 (Ala. Civ. App. 2014).
- 6 Iowa—[Star Equipment, Ltd. v. State, Iowa Dept. of Transp.](#), 843 N.W.2d 446 (Iowa 2014).
- 7 N.Y.—[Krieger v. City of Rochester](#), 42 Misc. 3d 753, 978 N.Y.S.2d 588 (Sup 2013).
- 8 Ky.—[Holbrook v. Lexmark Intern. ¶Group, Inc.](#), 65 S.W.3d 908 (Ky. 2001), as modified on denial of reh'g, (Feb. 21, 2002).
- 9 U.S.—[Mabey Bridge & Shore, Inc. v. Schoch](#), 666 F.3d 862 (3d Cir. 2012); [Hernandez-Mancilla v. Holder](#), 633 F.3d 1182 (9th Cir. 2011).
- 10 Alaska—[Alaska Judicial Council v. Kruse](#), 331 P.3d 375 (Alaska 2014).
- 11 Ark.—[Arnold v. State](#), 2011 Ark. 395, 384 S.W.3d 488 (2011).
- 12 La.—[State v. Brenan](#), 772 So. 2d 64 (La. 2000).

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§ 262. Due process challenges

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1039

A party asserting a due process challenge has the burden of proof unless a fundamental right is infringed.

When a state law is challenged on constitutional grounds as violative of due process, it is necessary to determine the nature of the right claimed to be infringed; if it is a fundamental right, the presumption of validity is weaker,¹ strict scrutiny applies,² and the State must show a compelling interest to vindicate the law.³ Where a statute is presumed to be constitutional and not violative of due process rights,⁴ the burden of showing that the statute is unreasonable for due process purposes falls on the party attacking it.⁵ A party asserting that a statute violates due process must overcome the presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way.⁶ The State does not bear the burden of presenting evidence to sustain a statute under the Due Process Clause,⁷ or of demonstrating that a rule of procedure is deeply rooted, but

an accused must show that a principle of procedure violated by a state's rule of evidence in a criminal trial, allegedly required by due process, is so rooted in tradition as to be considered fundamental.⁸

A party challenging a statute as being void for vagueness in violation of due process bears a heavy burden of proof, in view of the strong presumption of a statute's constitutionality,⁹ to prove beyond a reasonable doubt that it fails to make plain the general area of conduct it prohibits.¹⁰

The burden of proving a violation of substantive due process is on the party making that claim.¹¹ When determining whether economic legislation that substantially alters contractual rights and duties violates due process, the burden of proving irrationality clearly rests on the party asserting the due process challenge.¹²

Objectors to the retroactive application of a statute face a heavy burden under the state and federal due process clauses since the courts give credit to every rational presumption in favor of the legislation.¹³

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Footnotes

- 1 § 252.
- 2 § 1275.
- 3 Idaho.—[Bradbury v. Idaho Judicial Council](#), 136 Idaho 63, 28 P.3d 1006 (2001).
- 4 Tex.—[Luquis v. State](#), 72 S.W.3d 355 (Tex. Crim. App. 2002).
- 5 Cal.—[People v. Otto](#), 26 Cal. 4th 200, 109 Cal. Rptr. 2d 327, 26 P.3d 1061 (2001).
- 6 S.C.—[In re Ronnie A.](#), 355 S.C. 407, 585 S.E.2d 311 (2003).
U.S.—[National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.](#), 470 U.S. 451, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985); [Pension Ben. Guar. Corp. v. R.A. Gray & Co.](#), 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).
- 7 Pa.—[Nixon v. Com.](#), 576 Pa. 385, 839 A.2d 277 (2003).
- 8 U.S.—[Montana v. Egelhoff](#), 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).
- 9 N.H.—[State v. Porelle](#), 149 N.H. 420, 822 A.2d 562 (2003).
Wash.—[Medina v. Public Utility Dist. No. 1 of Benton County](#), 147 Wash. 2d 303, 53 P.3d 993 (2002).
- 10 Wash.—[State v. Sullivan](#), 143 Wash. 2d 162, 19 P.3d 1012 (2001).
- 11 Alaska—[Balough v. Fairbanks North Star Borough](#), 995 P.2d 245 (Alaska 2000).
Wash.—[Isla Verde Intern. Holdings, Inc. v. City of Camas](#), 146 Wash. 2d 740, 49 P.3d 867 (2002).
- 12 U.S.—[National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.](#), 470 U.S. 451, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985); [Pension Ben. Guar. Corp. v. R.A. Gray & Co.](#), 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).
- 13 W. Va.—[Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs, Workers' Compensation Div.](#), 214 W. Va. 95, 586 S.E.2d 170 (2003).
Mass.—[In re Liquidation of American Mut. Liability Ins. Co.](#), 434 Mass. 272, 747 N.E.2d 1215 (2001).
Wis.—[Matthies v. Positive Safety Mfg. Co.](#), 2001 WI 82, 244 Wis. 2d 720, 628 N.W.2d 842 (2001).

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§ 263. Discrimination and classifications

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1040

Unless the classification is suspect, the party challenging the constitutionality of a classification has the burden of proof.

Where legislative classifications are presumed to be constitutional,¹ the burden of showing that a statute is unconstitutional and violates the right to equal protection is on the challenging party, not on the party defending the statute.² The government is not required or expected to produce evidence to justify its legislative action³ or produce evidence to sustain the rationality of a statutory classification.⁴ Rather, the challenger must negate every conceivable or reasonable basis that might support the classification.⁵ The challenger also has the burden of showing clearly⁶ or beyond a reasonable doubt⁷ that the statute is unjustly discriminatory or that the classification is essentially arbitrary or unreasonable,⁸ the classification has no rational basis,⁹ there is no conceivable state of facts or grounds that would support the classification,¹⁰ or the classification bears no reasonable or rational relation to a conceivable legislative or state purpose.¹¹ The presumption of the constitutionality of a statute can

be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.¹² The burden does not rest on the proponent of the statute to show that it is reasonable.¹³

The exception to the general rule that statutes are presumed to be constitutional when a statute implicates a suspect classification or impacts a fundamental right¹⁴ shifts the burden for sustaining the statute's constitutionality to the government¹⁵ and places the burden on the party asserting the constitutionality of the classification to demonstrate that the classification substantially furthers a compelling state interest¹⁶ and that the distinctions drawn by the law are necessary to further its purpose.¹⁷ Conversely, a law creating a classification based on factors other than race, religion, birth, age, sex, culture, physical condition, or political ideas or affiliations is presumed to be constitutional under an equal protection analysis, and the party challenging the constitutionality of that law has the burden of proving it unconstitutional by showing that the classification does not suitably further any appropriate state interest.¹⁸ Thus, the party challenging the constitutionality of a classification has the burden of proving that a distinction does not pass the rational basis test¹⁹ when that test applies,²⁰ and absent evidence that protected minorities are disproportionately affected by a statute, the challenger has the burden of establishing that the statute is unconstitutional.²¹

Under a tax uniformity clause of a state constitution, the taxing body must first justify the tax classification, and once it comes forward with a justification, the challenging party must persuade the court that the justification is not supported by the facts or not sufficient as a matter of law.²²

CUMULATIVE SUPPLEMENT

Cases:

Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are presumptively invalid. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

Where a challenger asserting racial gerrymandering in violation of Equal Protection succeeds in establishing racial predominance in drawing electoral districts, the burden shifts to the State to demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. *U.S.C.A. Const. Amend. 14. Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017).

In a challenge to a governmental classification that does not involve a fundamental right or suspect class, and thus must be upheld against an equal protection challenge under the State Constitution if there is a rational basis for the classification, the State does not bear the burden of proving that some rational basis justifies the challenged legislation. *Ohio Const. art. 1, § 2. Sherman v. Ohio Public Employees Retirement System*, 2019-Ohio-278, 129 N.E.3d 974 (Ohio Ct. App. 10th Dist. Franklin County 2019), appeal allowed, 155 Ohio St. 3d 1467, 2019-Ohio-2100, 122 N.E.3d 1302 (2019).

[END OF SUPPLEMENT]

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Footnotes

1 § 256.

- 2 U.S.—[Armour v. City of Indianapolis](#), Ind., 132 S. Ct. 2073, 182 L. Ed. 2d 998 (2012); [New York State Club Ass'n, Inc. v. City of New York](#), 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).
- Cal.—[People v. Brown](#), 227 Cal. App. 4th 451, 173 Cal. Rptr. 3d 812 (3d Dist. 2014), review filed, (Aug. 1, 2014).
- Conn.—[State v. Dickerson](#), 151 Conn. App. 658, 97 A.3d 15 (2014).
- Ky.—[Hodge v. Com.](#), 116 S.W.3d 463 (Ky. 2003), as amended, (Aug. 25, 2003) and (overruled on other grounds by, [Leonard v. Com.](#), 279 S.W.3d 151 (Ky. 2009)).
- Mass.—[TIG Ins. Co., Inc. v. Department of Treasury](#), 464 Mich. 548, 629 N.W.2d 402 (2001).
- Neb.—[Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.](#), 265 Neb. 918, 663 N.W.2d 43 (2003).
- Ohio—[State v. Williams](#), 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).
- Heavy burden**
- Mass.—[Zayre Corp. v. Attorney General](#), 372 Mass. 423, 362 N.E.2d 878 (1977).
- Wash.—[Yakima County Deputy Sheriff's Ass'n v. Board of Com'rs for Yakima County](#), 92 Wash. 2d 831, 601 P.2d 936 (1979).
- 3 Fla.—[City of Fort Lauderdale v. Gonzalez](#), 134 So. 3d 1119 (Fla. 4th DCA 2014).
- Iowa—[Doe v. New London Community School Dist.](#), 848 N.W.2d 347, 306 Ed. Law Rep. 965 (Iowa 2014).
- 4 U.S.—[Gonzalez-Medina v. Holder](#), 641 F.3d 333 (9th Cir. 2011).
- 5 U.S.—[Armour v. City of Indianapolis](#), Ind., 132 S. Ct. 2073, 182 L. Ed. 2d 998 (2012); [F.C.C. v. Beach Communications, Inc.](#), 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); [Lehnhausen v. Lake Shore Auto Parts Co.](#), 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973).
- Fla.—[City of Fort Lauderdale v. Gonzalez](#), 134 So. 3d 1119 (Fla. 4th DCA 2014).
- Iowa—[Doe v. New London Community School Dist.](#), 848 N.W.2d 347, 306 Ed. Law Rep. 965 (Iowa 2014).
- Kan.—[Miller v. Johnson](#), 295 Kan. 636, 289 P.3d 1098 (2012).
- Mo.—[Amick v. Director of Revenue](#), 428 S.W.3d 638 (Mo. 2014), cert. denied, 135 S. Ct. 226, 190 L. Ed. 2d 171 (2014).
- Ohio—[State v. Hartsook](#), 2014-Ohio-4528, 21 N.E.3d 617 (Ohio Ct. App. 12th Dist. Warren County 2014).
- S.D.—[Tibbs v. Moody County Bd. of Com'rs](#), 2014 SD 44, 851 N.W.2d 208 (S.D. 2014).
- Tex.—[Spicer v. Texas Workforce Com'n](#), 430 S.W.3d 526 (Tex. App. Dallas 2014).
- 6 Ala.—[Thorn v. Jefferson County](#), 375 So. 2d 780 (Ala. 1979).
- Iowa—[Avery v. Peterson](#), 243 N.W.2d 630 (Iowa 1976).
- Tex.—[Board of Ins. Com'rs v. Great Southern Life Ins. Co.](#), 150 Tex. 258, 239 S.W.2d 803 (1951).
- 7 Ohio—[State v. Hartsook](#), 2014-Ohio-4528, 21 N.E.3d 617 (Ohio Ct. App. 12th Dist. Warren County 2014).
- Wash.—[Thorp v. Town of Lebanon](#), 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59 (2000).
- Wyo.—[Travelocity.com LP v. Wyoming Dept. of Revenue](#), 2014 WY 43, 329 P.3d 131 (Wyo. 2014).
- 8 U.S.—[Pacific States Box & Basket Co. v. White](#), 296 U.S. 176, 56 S. Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853 (1935).
- Ala.—[Thorn v. Jefferson County](#), 375 So. 2d 780 (Ala. 1979).
- Cal.—[Mathews v. Workmen's Comp. Appeals Bd.](#), 6 Cal. 3d 719, 100 Cal. Rptr. 301, 493 P.2d 1165 (1972).
- Colo.—[People v. Goodale](#), 78 P.3d 1103 (Colo. 2003).
- Fla.—[North Ridge General Hospital, Inc. v. City of Oakland Park](#), 374 So. 2d 461 (Fla. 1979).
- Haw.—[Hayes v. Gill](#), 52 Haw. 251, 473 P.2d 872 (1970).
- La.—[Jefferson Parish v. Sharlo Corp.](#), 283 So. 2d 246 (La. 1973).
- Me.—[Ace Tire Co., Inc. v. Municipal Officers of City of Waterville](#), 302 A.2d 90 (Me. 1973).
- Mich.—[Johnson v. Harnischfeger Corp.](#), 414 Mich. 102, 323 N.W.2d 912 (1982).
- Mo.—[State ex rel. Toedebusch Transfer, Inc. v. Public Service Commission](#), 520 S.W.2d 38 (Mo. 1975).
- N.H.—[Valley Bank v. State](#), 115 N.H. 151, 335 A.2d 652 (1975).
- N.J.—[Chamber of Commerce of U. S. v. State](#), 89 N.J. 131, 445 A.2d 353 (1982).
- N.C.—[Hursey v. Town of Gibsonville](#), 284 N.C. 522, 202 S.E.2d 161 (1974).
- Or.—[Oregon State Homebuilders Ass'n v. City of Tigard](#), 43 Or. App. 791, 604 P.2d 886 (1979).
- S.D.—[Crowley v. State](#), 268 N.W.2d 616 (S.D. 1978).
- Tenn.—[Stalcup v. City of Gatlinburg](#), 577 S.W.2d 439 (Tenn. 1978).
- Utah—[Utah Public Emp. Ass'n v. State](#), 610 P.2d 1272 (Utah 1980).

- Va.—[Estes Funeral Home v. Adkins](#), 266 Va. 297, 586 S.E.2d 162 (2003).
Wash.—[Washington Educ. Ass'n v. Smith](#), 96 Wash. 2d 601, 638 P.2d 77, 1 Ed. Law Rep. 1317 (1981).
W. Va.—[Thomas v. Rutledge](#), 167 W. Va. 487, 280 S.E.2d 123 (1981).
Wis.—[Schatz v. State, Dept. of Social and Health Services](#), 178 Wash. App. 16, 314 P.3d 406 (Div. 2 2013), review denied, 180 Wash. 2d 1013, 325 P.3d 914 (2014).
Wyo.—[Phillips v. ABC Builders, Inc.](#), 611 P.2d 821 (Wyo. 1980).

Legislative classifications for taxing purposes

- Ill.—[Empress Casino Joliet Corp. v. Giannoulias](#), 231 Ill. 2d 62, 324 Ill. Dec. 491, 896 N.E.2d 277 (2008).
9 Conn.—[Papa v. New Haven Federation of Teachers](#), 186 Conn. 725, 444 A.2d 196, 3 Ed. Law Rep. 998 (1982).
Fla.—[Abdoool v. Bondi](#), 141 So. 3d 529 (Fla. 2014).
Ga.—[Anderson v. Little & Davenport Funeral Home, Inc.](#), 242 Ga. 751, 251 S.E.2d 250 (1978).
La.—[State v. Petrovich](#), 396 So. 2d 1318 (La. 1981).
Mont.—[Cecil v. Allied Stores Corp.](#), 162 Mont. 491, 513 P.2d 704 (1973).
Or.—[Bryant v. Seagraves](#), 270 Or. 16, 526 P.2d 1027 (1974).
S.C.—[Holzwasser v. Brady](#), 262 S.C. 481, 205 S.E.2d 701 (1974).
Wyo.—[Meyer v. Kendig](#), 641 P.2d 1235 (Wyo. 1982).

Special legislation

The party assailing an enactment as violative of a state constitutional provision prohibiting special legislation carries the burden of establishing that it does not rest upon a reasonable basis and is essentially arbitrary.

- Va.—[Jefferson Green Unit Owners Ass'n, Inc. v. Gwinn](#), 262 Va. 449, 551 S.E.2d 339 (2001).
10 U.S.—[Golden State Transit Corp. v. City of Los Angeles](#), 686 F.2d 758 (9th Cir. 1982).
Mass.—[Old Colony R. Co. v. Assessors of Boston](#), 309 Mass. 439, 35 N.E.2d 246 (1941).
N.H.—[Ratti v. Hinsdale Raceway, Inc.](#), 109 N.H. 270, 249 A.2d 859 (1969).
N.Y.—[Cassata v. State](#), 115 A.D.3d 1209, 982 N.Y.S.2d 260 (4th Dep't 2014), appeal dismissed, 23 N.Y.3d 1005, 992 N.Y.S.2d 767, 16 N.E.3d 1245 (2014).
Wash.—[State v. Smith](#), 93 Wash. 2d 329, 610 P.2d 869 (1980).
11 U.S.—[Cherry v. Steiner](#), 543 F. Supp. 1270 (D. Ariz. 1982), judgment aff'd, 716 F.2d 687 (9th Cir. 1983);
[Woonsocket Prescription Center, Inc. v. Michaelson](#), 417 F. Supp. 1250 (D.R.I. 1976).
Cal.—[Calderone v. Post](#), 134 Cal. App. 3d 1008, 185 Cal. Rptr. 52 (2d Dist. 1982).
La.—[Acorn v. City of New Orleans](#), 377 So. 2d 1206 (La. 1979).
Haw.—[State v. Bloss](#), 62 Haw. 147, 613 P.2d 354 (1980).
Mass.—[Roberts v. State Tax Commission](#), 360 Mass. 724, 277 N.E.2d 499 (1972).
N.M.—[Einer v. Rivera](#), 2015 WL 433648 (N.M. Ct. App. 2015).

Relation to object of legislation

A party assailing a classification as violative of the state and federal constitutions has the burden of showing with convincing clarity that the classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

- Haw.—[Nelson v. Miwa](#), 56 Haw. 601, 546 P.2d 1005, 81 A.L.R.3d 799 (1976).
12 U.S.—[Lehnhausen v. Lake Shore Auto Parts Co.](#), 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973).
Conn.—[United Illuminating Co. v. City of New Haven](#), 179 Conn. 627, 427 A.2d 830 (1980).
Iowa—[Borden v. Selden](#), 259 Iowa 808, 146 N.W.2d 306 (1966).
Mont.—[State ex rel. Hammond v. Hager](#), 160 Mont. 391, 503 P.2d 52 (1972).
S.C.—[Fraternal Order of Police v. South Carolina Dept. of Revenue](#), 352 S.C. 420, 574 S.E.2d 717 (2002).
13 Mo.—[Kellogg v. Murphy](#), 349 Mo. 1165, 164 S.W.2d 285 (1942).
14 Colo.—[City of Greenwood Village v. Petitioners for Proposed City of Centennial](#), 3 P.3d 427 (Colo. 2000).
15

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Colo.—[City of Greenwood Village v. Petitioners for Proposed City of Centennial](#), 3 P.3d 427 (Colo. 2000).

Racial classification

(1) Strict scrutiny of a racial classification under the Equal Protection Clause is a searching examination, and the government bears the burden to prove that the reasons for the classification are clearly identified and unquestionably legitimate.

- U.S.—[Fisher v. University of Texas at Austin](#), 133 S. Ct. 2411, 186 L. Ed. 2d 474, 293 Ed. Law Rep. 588 (2013).

(2) Judicial deference toward local school boards on the issue of using racial classifications in student assignment plans is fundamentally at odds with equal protection jurisprudence, and the burden is on the state actors to demonstrate that their race-based policies are justified.

U.S.—[Parents Involved in Community Schools v. Seattle School Dist. No. 1](#), 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 220 Ed. Law Rep. 84 (2007).

Gender-based discrimination

Ark.—[Boshears v. Arkansas Racing Commission](#), 258 Ark. 741, 528 S.W.2d 646 (1975).

16 Alaska—[Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough](#), 527 P.2d 447 (Alaska 1974).

Cal.—[In re King](#), 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970).

Haw.—[Nelson v. Miwa](#), 56 Haw. 601, 546 P.2d 1005, 81 A.L.R.3d 799 (1976).

Idaho—[Bradbury v. Idaho Judicial Council](#), 136 Idaho 63, 28 P.3d 1006 (2001).

Iowa—[In re Detention of Williams](#), 628 N.W.2d 447 (Iowa 2001).

La.—[State v. Fleury](#), 799 So. 2d 468 (La. 2001).

Kan.—[Barrett ex rel. Barrett v. Unified School Dist. No. 259](#), 272 Kan. 250, 32 P.3d 1156, 157 Ed. Law Rep. 917 (2001).

Me.—[State v. Rush](#), 324 A.2d 748 (Me. 1974).

Miss.—[Rias v. Henderson](#), 342 So. 2d 737 (Miss. 1977).

N.J.—[Levine v. State Dept. of Institutions and Agencies](#), 84 N.J. 234, 418 A.2d 229 (1980).

Okla.—[Thayer v. Phillips Petroleum Co.](#), 1980 OK 95, 613 P.2d 1041 (Okla. 1980).

Va.—[Sandiford v. Com.](#), 217 Va. 117, 225 S.E.2d 409 (1976).

17 Cal.—[In re King](#), 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970).

Okla.—[Thayer v. Phillips Petroleum Co.](#), 1980 OK 95, 613 P.2d 1041 (Okla. 1980).

18 La.—[State v. Fleury](#), 799 So. 2d 468 (La. 2001).

19 N.H.—[In re Wintle](#), 146 N.H. 664, 781 A.2d 995 (2001), as modified on denial of reh'g, (Oct. 25, 2001).

Wash.—[1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.](#), 144 Wash. 2d 570, 29 P.3d 1249 (2001).

20 § 1279.

21 S.C.—[State v. Jones](#), 344 S.C. 48, 543 S.E.2d 541 (2001).

22 Ill.—[Primeco Personal Communications, L.P. v. I.C.C.](#), 196 Ill. 2d 70, 255 Ill. Dec. 621, 750 N.E.2d 202 (2001).

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Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

7. Effect of Determination

§ 264. Decisions upholding constitutionality

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1045

Decisions on the constitutionality of statutes only determine the validity of the provisions at issue.

A holding whether a statute is constitutional determines its validity only on questions considered and determined by the court, and silence does not have the effect of validating a section of an act not at issue and determined.¹

A decision upholding the constitutionality of a statute does not preclude subsequent consideration of questions pertaining to its administration.²

Whenever a statute is enforced by a court judgment, a judicial determination is implied that the statute is a valid enactment and free from all constitutional objections.³

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Footnotes

- 1 Neb.—[Blue Flame Gas Ass'n v. McCook Public Power Dist.](#), 186 Neb. 735, 186 N.W.2d 498 (1971).
- 2 U.S.—[Jurek v. Estelle](#), 593 F.2d 672 (5th Cir. 1979), on reh'g, [623 F.2d 929](#) (5th Cir. 1980).
- 3 Fla.—[Florida Dry Cleaning and Laundry Bd. v. Everglades Laundry](#), 137 Fla. 290, 188 So. 380 (1939).
- 3 Va.—[Edwards v. Com.](#), 191 Va. 272, 60 S.E.2d 916 (1950).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

7. Effect of Determination

§ 265. Decisions declaring statutes unconstitutional, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1045

While it has been said that a statute declared unconstitutional is null and void as of the date of its enactment, this statement is too broad and is subject to many exceptions and qualifications.

When a statute is declared unconstitutional, it falls because it must yield to the basic, superior law.¹ Broadly, an unconstitutional statute is void,² despite the legislature's failure to repeal it,³ and its invalidity must be recognized or acknowledged as applied to any state of facts.⁴ Such a statute is not a law,⁵ has no existence,⁶ is a nullity,⁷ or has no force⁸ or effect⁹ or is inoperative.¹⁰ An act that has been declared unconstitutional is, in legal contemplation, as inoperative as though it had never been passed or written,¹¹ and it is regarded as invalid, or void, from the date of enactment (not only from the date on which it is judicially declared unconstitutional)¹² and at all times thereafter.¹³

The general statements in the preceding paragraph, however, have been greatly modified,¹⁴ and are not to be applied in all cases,¹⁵ and there are various exceptions.¹⁶ Even an unconstitutional statute is an operative fact,¹⁷ at least prior to a determination of constitutionality,¹⁸ and may have consequences that may not be justly ignored.¹⁹ Thus, it has been held that

an unconstitutional statute is not void, but only voidable,²⁰ or is unenforceable rather than void, when it is superseded by federal legislation²¹ and not void in the sense that it is repealed or abolished.²² Therefore, although a statute has been declared unconstitutional as applied to subjects solely under the control of the federal government, it may subsequently be validly applied to subjects legitimately within the State's power.²³

A statute held unconstitutional remains inoperative as long as the decision holding it invalid is maintained,²⁴ and as long as the decision stands, the statute is dormant but not dead.²⁵ If the decision that a statute is unconstitutional is subsequently reversed or overruled, the statute will ordinarily be treated as valid and effective from the date of its enactment,²⁶ or from its first effective date,²⁷ and does not require reenactment by the legislature to restore its operative force,²⁸ but under other authority, a person may not be held liable under a criminal statute for acts committed during the time that the judicial declaration of invalidity stood unreversed.²⁹

CUMULATIVE SUPPLEMENT

Cases:

Court's authority in invalidating a law as unconstitutional amounts to little more than the negative power to disregard an unconstitutional enactment. (Per Justice Kavanaugh, with two Justices concurring and four Justices concurring in the judgment.) *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020).

The void ab initio doctrine that a conviction under a statute that subsequently declared to be unconstitutional is void ab initio is rooted in a judicial imperative to protect individual constitutional rights, such as the right of due process, against transgression by coordinate branches of government. *U.S. Const. Amend. 14. Commonwealth v. McIntyre*, 232 A.3d 609 (Pa. 2020).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—*Warring v. Colpoys*, 122 F.2d 642, 136 A.L.R. 1025 (App. D.C. 1941).
D.C.—*Jawish v. Morlet*, 86 A.2d 96 (Mun. Ct. App. D.C. 1952).

2 U.S.—*Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803); *Journigan v. Duffy*, 552 F.2d 283 (9th Cir. 1977).
Cal.—*Cummings v. Morez*, 42 Cal. App. 3d 66, 116 Cal. Rptr. 586 (2d Dist. 1974).
Mont.—*Sadler v. Connolly*, 175 Mont. 484, 575 P.2d 51 (1978).
Nev.—*Batesel v. Schultz*, 91 Nev. 553, 540 P.2d 100 (1975).
N.D.—*Olson v. Dillerud*, 226 N.W.2d 363 (N.D. 1975).
Utah—*Egbert v. Nissan Motor Co., Ltd.*, 2010 UT 8, 228 P.3d 737 (Utah 2010).

Facial attack

If a party challenging the constitutionality of a statute succeeds in a facial attack on a law, the law is void from its beginning to the end.

Wis.—*State v. Wood*, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63 (2010).

3 Ill.—*People v. Deese*, 402 Ill. 200, 83 N.E.2d 707 (1949).

4 Ga.—*Royal Cigar Co. v. Huiet*, 195 Ga. 852, 25 S.E.2d 810 (1943).

5 U.S.—*Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913); *Journigan v. Duffy*, 552 F.2d 283 (9th Cir. 1977).
Ariz.—*Moore v. Industrial Commission*, 24 Ariz. App. 324, 538 P.2d 411 (Div. 1 1975).

- Cal.—[Bookasta v. Hartford Acc. & Indem. Co.](#), 46 Cal. App. 3d 237, 120 Cal. Rptr. 229 (2d Dist. 1975).
Ga.—[Dobson v. Brown](#), 225 Ga. 73, 166 S.E.2d 22 (1969).
Md.—[Johnson v. State](#), 271 Md. 189, 315 A.2d 524 (1974).
Mich.—[Briggs v. Campbell, Wyant & Cannon Foundry Co.](#), 379 Mich. 160, 150 N.W.2d 752 (1967).
Ohio—[Primes v. Tyler](#), 43 Ohio St. 2d 195, 72 Ohio Op. 2d 112, 331 N.E.2d 723 (1975).
Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
Tex.—[Newsom v. Starkey](#), 572 S.W.2d 29 (Tex. Civ. App. Dallas 1978).
U.S.—[Gary v. Spires](#), 473 F. Supp. 878 (D.S.C. 1979).
Wis.—[Hunter v. School Dist. of Gale-Ettrick-Trempealeau](#), 97 Wis. 2d 435, 293 N.W.2d 515 (1980).
Ind.—[Ulrich v. Beatty](#), 139 Ind. App. 174, 216 N.E.2d 737 (1966).
Neb.—[State v. Bardsley](#), 185 Neb. 629, 177 N.W.2d 599 (1970) (overruled in part on other grounds by, [State v. Rosenberger](#), 187 Neb. 726, 193 N.W.2d 769 (1972)).
Ariz.—[Findlay v. Board of Sup'rs of Mohave County](#), 72 Ariz. 58, 230 P.2d 526, 24 A.L.R.2d 841 (1951).
Tex.—[Bell v. Phillips Petroleum Co.](#), 278 S.W.2d 407 (Tex. Civ. App. Amarillo 1954), writ refused n.r.e.
Wash.—[City of Seattle v. Grundy](#), 86 Wash. 2d 49, 541 P.2d 994 (1975).
Ariz.—[Findlay v. Board of Sup'rs of Mohave County](#), 72 Ariz. 58, 230 P.2d 526, 24 A.L.R.2d 841 (1951).
Mich.—[Briggs v. Campbell, Wyant & Cannon Foundry Co.](#), 379 Mich. 160, 150 N.W.2d 752 (1967).
Mont.—[State v. Coleman](#), 185 Mont. 299, 605 P.2d 1000 (1979).
Tex.—[Bell v. Phillips Petroleum Co.](#), 278 S.W.2d 407 (Tex. Civ. App. Amarillo 1954), writ refused n.r.e.
Wash.—[City of Seattle v. Grundy](#), 86 Wash. 2d 49, 541 P.2d 994 (1975).
D.C.—[Jawish v. Morlet](#), 86 A.2d 96 (Mun. Ct. App. D.C. 1952).
Fla.—[State ex rel. Badgett v. Lee](#), 156 Fla. 291, 22 So. 2d 804 (1945).
Minn.—[State v. One Oldsmobile Two-Door Sedan, Model 1946](#), 227 Minn. 280, 35 N.W.2d 525 (1948).
U.S.—[Chicago, I. & L.R. Co. v. Hackett](#), 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913).
Ariz.—[Moore v. Industrial Commission](#), 24 Ariz. App. 324, 538 P.2d 411 (Div. 1 1975).
Cal.—[Bookasta v. Hartford Acc. & Indem. Co.](#), 46 Cal. App. 3d 237, 120 Cal. Rptr. 229 (2d Dist. 1975).
Md.—[Johnson v. State](#), 271 Md. 189, 315 A.2d 524 (1974).
Mont.—[Sadler v. Connolly](#), 175 Mont. 484, 575 P.2d 51 (1978).
N.J.—[Kozlowski v. Kozlowski](#), 80 N.J. 378, 403 A.2d 902 (1979).
N.M.—[State v. Rondeau](#), 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688 (1976).
Ohio—[Primes v. Tyler](#), 43 Ohio St. 2d 195, 72 Ohio Op. 2d 112, 331 N.E.2d 723 (1975).
Pa.—[G. H. McShane Co., Inc. v. Travelers Indem. Co.](#), 262 Pa. Super. 80, 396 A.2d 654 (1978).
Tex.—[In re Johnson](#), 554 S.W.2d 775 (Tex. Civ. App. Corpus Christi 1977), writ refused n.r.e., 569 S.W.2d 882 (Tex. 1978).
Wis.—[G. Heileman Brewing Co., Inc. v. City of La Crosse, La Crosse County](#), 105 Wis. 2d 152, 312 N.W.2d 875, 25 A.L.R.4th 176 (Ct. App. 1981).
With few exceptions
Ark.—[Huffman v. Dawkins](#), 273 Ark. 520, 622 S.W.2d 159 (1981).
Fla.—[Russo v. State](#), 270 So. 2d 428 (Fla. 4th DCA 1972).
Ill.—[People v. Zeisler](#), 125 Ill. 2d 42, 125 Ill. Dec. 845, 531 N.E.2d 24 (1988).
Mich.—[Briggs v. Campbell, Wyant & Cannon Foundry Co.](#), 379 Mich. 160, 150 N.W.2d 752 (1967).
Neb.—[State v. Bardsley](#), 185 Neb. 629, 177 N.W.2d 599 (1970) (overruled in part on other grounds by, [State v. Rosenberger](#), 187 Neb. 726, 193 N.W.2d 769 (1972)).
Tenn.—[State v. Dixon](#), 530 S.W.2d 73 (Tenn. 1975).
Wis.—[State ex rel. Commissioners of Public Lands v. Anderson](#), 56 Wis. 2d 666, 203 N.W.2d 84 (1973).
Statute void ab initio
Ill.—[In re G.O.](#), 191 Ill. 2d 37, 245 Ill. Dec. 269, 727 N.E.2d 1003 (2000).
Mich.—[Stanton v. Lloyd Hammond Produce Farms](#), 400 Mich. 135, 253 N.W.2d 114 (1977).
Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
Ala.—[Shirley v. Getty Oil Co.](#), 367 So. 2d 1388 (Ala. 1979).
Forever void
Ga.—[Grayson-Robinson Stores, Inc. v. Oneida, Limited](#), 209 Ga. 613, 75 S.E.2d 161 (1953).
Cal.—[Bookasta v. Hartford Acc. & Indem. Co.](#), 46 Cal. App. 3d 237, 120 Cal. Rptr. 229 (2d Dist. 1975).

- 15 U.S.—[Lemon v. Kurtzman](#), 411 U.S. 192, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973).
N.C.—[American Mfrs. Mut. Ins. Co. v. Ingram](#), 301 N.C. 138, 271 S.E.2d 46 (1980).
16 Ga.—[Strickland v. Newton County](#), 244 Ga. 54, 258 S.E.2d 132 (1979).
17 U.S.—[Warring v. Colpoys](#), 122 F.2d 642, 136 A.L.R. 1025 (App. D.C. 1941).
D.C.—[Downs v. Jacobs](#), 272 A.2d 706 (Del. 1970); [Jawish v. Morlet](#), 86 A.2d 96 (Mun. Ct. App. D.C. 1952).
18 U.S.—[Chicot County Drainage Dist. v. Baxter State Bank](#), 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940).
Cal.—[Bookasta v. Hartford Acc. & Indem. Co.](#), 46 Cal. App. 3d 237, 120 Cal. Rptr. 229 (2d Dist. 1975).
19 U.S.—[Chicot County Drainage Dist. v. Baxter State Bank](#), 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940).
Cal.—[Bookasta v. Hartford Acc. & Indem. Co.](#), 46 Cal. App. 3d 237, 120 Cal. Rptr. 229 (2d Dist. 1975).
20 Tenn.—[Cumberland Capital Corp. v. Patty](#), 556 S.W.2d 516 (Tenn. 1977).
21 N.J.—[General Elec. Co. v. Packard Bamberger & Co.](#), 14 N.J. 209, 102 A.2d 18 (1953).
22 D.C.—[Jawish v. Morlet](#), 86 A.2d 96 (Mun. Ct. App. D.C. 1952).
23 Iowa—[State v. Bevins](#), 210 Iowa 1031, 230 N.W. 865 (1930).
N.J.—[General Elec. Co. v. Packard Bamberger & Co.](#), 14 N.J. 209, 102 A.2d 18 (1953).
24 N.Y.—[General Elec Co. v. Masters, Inc.](#), 307 N.Y. 229, 120 N.E.2d 802 (1954).
Tex.—[McKinney v. Blankenship](#), 154 Tex. 632, 282 S.W.2d 691 (1955).
25 Fla.—[State ex rel. Badgett v. Lee](#), 156 Fla. 291, 22 So. 2d 804 (1945).
D.C.—[Jawish v. Morlet](#), 86 A.2d 96 (Mun. Ct. App. D.C. 1952).
Fla.—[State ex rel. Badgett v. Lee](#), 156 Fla. 291, 22 So. 2d 804 (1945).
26 Fla.—[State ex rel. Patterson v. Lee](#), 121 Fla. 541, 164 So. 188 (1935).
D.C.—[Jawish v. Morlet](#), 86 A.2d 96 (Mun. Ct. App. D.C. 1952).
27 Fla.—[State ex rel. Badgett v. Lee](#), 156 Fla. 291, 22 So. 2d 804 (1945).
D.C.—[Jawish v. Morlet](#), 86 A.2d 96 (Mun. Ct. App. D.C. 1952).
28 Fla.—[Chavers v. Harrell](#), 122 Fla. 669, 166 So. 261 (1935).
29 N.J.—[Ex parte Rose](#), 122 N.J.L. 507, 6 A.2d 388 (N.J. Sup. Ct. 1939).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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7. Effect of Determination

§ 266. Effect of unconstitutional statute on other statutes

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West's Key Number Digest

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An unconstitutional statute does not affect other statutes, and a determination of its unconstitutionality results in the reinstatement of a statute replaced by it.

Where a statute has been held unconstitutional, it does not affect,¹ modify,² or supersede³ a valid statute and is not legally inconsistent with a valid statute.⁴ The result of holding a statute unconstitutional is to reinstate the prior statute on the same subject that had been replaced.⁵

Where a statute is declared unconstitutional, all acts, the effectiveness of which is made conditional on its validity, are, likewise, invalid.⁶ A legislature cannot, by a curative act, validate proceedings that are entirely void because the statute under which the court acted was unconstitutional.⁷ A statute reenacting a prior statute that contains a provision previously ruled unconstitutional is also unconstitutional⁸ as is an amendment embodying the same objectionable features that rendered the original statute unconstitutional.⁹ Notwithstanding this rule, unconstitutional legislation may be amended so as to render it constitutional, so far as its future operation is concerned, by conforming it to constitutional requirements.¹⁰

An unconstitutional amendment to a statute is not effective.¹¹ The effect of an unconstitutional amendment is to leave the statute in force as it existed prior to the adoption of the amendment.¹²

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Footnotes

- 1 Minn.—[State v. One Oldsmobile Two-Door Sedan, Model 1946](#), 227 Minn. 280, 35 N.W.2d 525 (1948).
Neb.—[Sullivan v. City of Omaha](#), Neb., 146 Neb. 297, 21 N.W.2d 510 (1946).
N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).
S.C.—[State ex rel. Thornton v. Wannamaker](#), 248 S.C. 421, 150 S.E.2d 607 (1966).
- 2 N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).
S.C.—[State ex rel. Thornton v. Wannamaker](#), 248 S.C. 421, 150 S.E.2d 607 (1966).
- 3 U.S.—[Chicago, I. & L.R. Co. v. Hackett](#), 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913).
N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).
S.C.—[State ex rel. Thornton v. Wannamaker](#), 248 S.C. 421, 150 S.E.2d 607 (1966).
As to the effect of the invalidity of a repealing statute, see [C.J.S., Statutes § 339](#).
- 4 N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).
S.C.—[State ex rel. Thornton v. Wannamaker](#), 248 S.C. 421, 150 S.E.2d 607 (1966).
- 5 U.S.—[Reed's Estate v. C.I.R.](#), 171 F.2d 685 (8th Cir. 1948); [Goines v. Rockefeller](#), 338 F. Supp. 1189 (S.D. W. Va. 1972).
Conn.—[Ruttenberg v. Dine](#), 137 Conn. 17, 74 A.2d 211 (1950).
Del.—[Stratton v. Travis](#), 380 A.2d 985 (Del. Super. Ct. 1977).
Ill.—[Giebelhausen v. Daley](#), 407 Ill. 25, 95 N.E.2d 84 (1950).
S.C.—[State ex rel. Thornton v. Wannamaker](#), 248 S.C. 421, 150 S.E.2d 607 (1966).
Tenn.—[Harrison v. State](#), 527 S.W.2d 745 (Tenn. Crim. App. 1975).
- 6 U.S.—[U.S. v. Moor](#), 93 F.2d 422 (C.C.A. 5th Cir. 1937).
Ala.—[State v. Hardage](#), 210 Ala. 666, 98 So. 718 (1923).
- 7 Ariz.—[Ferguson v. Superior Court of Maricopa County](#), 76 Ariz. 31, 258 P.2d 421 (1953).
Ala.—[Alabama Independent Service Stations Ass'n v. Hunter](#), 249 Ala. 403, 31 So. 2d 571 (1947).
- 8 Fla.—[State ex rel. Badgett v. Lee](#), 156 Fla. 291, 22 So. 2d 804 (1945).
Ill.—[Albers v. Lamson](#), 380 Ill. 35, 42 N.E.2d 627 (1942).
- 9 Ga.—[Royal Cigar Co. v. Huiet](#), 195 Ga. 852, 25 S.E.2d 810 (1943).
- 10 Tex.—[Ex parte Hensley](#), 162 Tex. Crim. 348, 285 S.W.2d 720 (1956).
- 11 Ill.—[People ex rel. Barrett v. Sbarbaro](#), 386 Ill. 581, 54 N.E.2d 559 (1944).
Minn.—[Bongard v. Bongard](#), 342 N.W.2d 156 (Minn. Ct. App. 1983).
La.—[Archer v. City of Shreveport](#), 226 La. 867, 77 So. 2d 517 (1955).
- 12 Ill.—[Illinois Liquor Control Commission v. Chicago's Last Liquor Store](#), 403 Ill. 578, 88 N.E.2d 15 (1949).
S.C.—[State ex rel. Thornton v. Wannamaker](#), 248 S.C. 421, 150 S.E.2d 607 (1966).
Tenn.—[State v. Dixon](#), 530 S.W.2d 73 (Tenn. 1975).

Tax law

Where an amendatory tax law was invalid, the law prior to its enactment was still in effect, and therefore, the collection of taxes for the current year would not be jeopardized.

Ill.—[Giebelhausen v. Daley](#), 407 Ill. 25, 95 N.E.2d 84 (1950).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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7. Effect of Determination

§ 267. Severability

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West's Key Number Digest

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The usual rules regarding the severability of invalid provisions of statutes also apply to the severability of provisions of constitutional amendments and initiatives not enacted in accordance with constitutional requirements.

While it has been said that an unconstitutional statute is wholly void,¹ the legal effect, in accordance with the general rules on the severability of invalid portions of statutes,² of a decision holding only a particular section unconstitutional, in a proceeding in which the constitutionality of the entire act is challenged, is that the remainder of the act is constitutional.³ However, it may be that the constitutionally valid provisions are of such a limited portion of the statute that after removing the unconstitutional language the provisions are so incomplete or riddled with omissions that they cannot be salvaged.⁴ Though the presumption is against the mutilation of a statute by severing unconstitutional provisions, if removing the offending provisions will not frustrate the purpose or disrupt the integrity of the law, a court will strike only those provisions of the statute that are unconstitutional.⁵

The doctrine of severability also applies to initiative measures.⁶ A determination that a provision in a constitutional amendment was not ratified in accordance with constitutional requirements does not affect other changes ratified simultaneously where

the invalid change was neither dependent upon nor interwoven with the others⁷ but not where portions of the amendment that would have remained were not autonomous.⁸

An initiative measure that violates a single subject rule of a state constitution is void in its entirety since the defect is in allowing the voters to cast one vote on multiple constitutional amendments.⁹

Initiative provisions on such issues as term limits, which are unconstitutional as to matters preempted by federal law, are severable in the sense that may remain effective as to state officials¹⁰ but are not severable to the extent that the initiative is an attempt to modify the qualifications for federal office.¹¹

A severability analysis may not be required for those provisions of a right-to-work law incorporated into a state constitution that were not preempted by federal law where the state law contemplated that some of its provisions might not operate in certain circumstances as a result of the interpretation of federal law by the federal courts.¹²

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Footnotes

1 Ariz.—[Moore v. Industrial Commission](#), 24 Ariz. App. 324, 538 P.2d 411 (Div. 1 1975).
N.J.—[Kozlowski v. Kozlowski](#), 80 N.J. 378, 403 A.2d 902 (1979).
Okla.—[Town of Medford ex rel. Fuss v. Early](#), 1944 OK 328, 194 Okla. 566, 153 P.2d 633 (1944).
Tex.—[Genzer v. Fillip](#), 134 S.W.2d 730 (Tex. Civ. App. Austin 1939), writ dismissed, judgment correct.

2 C.J.S., Statutes §§ 112 et seq.

3 Ill.—[Chatkin v. University of Ill.](#), 411 Ill. 105, 103 N.E.2d 498 (1952).
Tex.—[Ex parte Nelson](#), 594 S.W.2d 67 (Tex. Crim. App. 1979).

Determination of severability

In determining whether an unconstitutional enactment is severable from the remainder of the act, a court must retain those portions of the act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute; congressional intent serves as the basis for this severability test.

U.S.—[Hamad v. Gates](#), 732 F.3d 990 (9th Cir. 2013), cert. denied, 134 S. Ct. 2866, 189 L. Ed. 2d 810 (2014).

4 Colo.—[Dallman v. Ritter](#), 225 P.3d 610 (Colo. 2010).

5 Mont.—[Williams v. Board of County Com'rs of Missoula County](#), 2013 MT 243, 371 Mont. 356, 308 P.3d 88 (2013).

6 Cal.—[Raven v. Deukmejian](#), 52 Cal. 3d 336, 276 Cal. Rptr. 326, 801 P.2d 1077 (1990).

Fla.—[Ray v. Mortham](#), 742 So. 2d 1276 (Fla. 1999) (holding modified on other grounds by, [Cook v. City of Jacksonville](#), 823 So. 2d 86, 112 A.L.R.5th 701 (Fla. 2002)).

Test of severability

Where an initiative contains a severability clause, an invalid provision is severable if it can be separated grammatically, functionally, and volitionally.

Cal.—[Pala Band of Mission Indians v. Board of Supervisors](#), 54 Cal. App. 4th 565, 63 Cal. Rptr. 2d 148 (4th Dist. 1997).

7 N.H.—[Fischer v. Governor](#), 145 N.H. 28, 749 A.2d 321 (2000).

8 Colo.—[Evans v. Romer](#), 882 P.2d 1335, 95 Ed. Law Rep. 392 (Colo. 1994), judgment aff'd, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 109 Ed. Law Rep. 539 (1996).

9 Cal.—[Senate of State of Cal. v. Jones](#), 21 Cal. 4th 1142, 90 Cal. Rptr. 2d 810, 988 P.2d 1089 (1999).

Mont.—[Marshall v. State ex rel. Cooney](#), 1999 MT 33, 293 Mont. 274, 975 P.2d 325 (1999).

Or.—[League of Oregon Cities v. State](#), 334 Or. 645, 56 P.3d 892 (2002), subsequent determination on other grounds, 336 Or. 593, 87 P.3d 672 (2004) and subsequent determination, 338 Or. 57, 107 P.3d 626 (2005), opinion on other grounds after grant of review, 339 Or. 186, 118 P.3d 256 (2005).

- 10 Ark.—[U.S. Term Limits, Inc. v. Hill](#), 316 Ark. 251, 872 S.W.2d 349 (1994), judgment aff'd, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).
- Fla.—[Ray v. Mortham](#), 742 So. 2d 1276 (Fla. 1999) (holding modified on other grounds by, [Cook v. City of Jacksonville](#), 823 So. 2d 86, 112 A.L.R.5th 701 (Fla. 2002)).
- 11 U.S.—[Gralike v. Cook](#), 191 F.3d 911 (8th Cir. 1999), judgment aff'd, 531 U.S. 510, 121 S. Ct. 1029, 149 L. Ed. 2d 44 (2001).
- 12 Okla.—[Local 514 Transport Workers Union of America v. Keating](#), 2003 OK 110, 83 P.3d 835 (Okla. 2003).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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§ 268. Remedies, rights, and duties affected by declaration of unconstitutionality

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West's Key Number Digest

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As a general rule, the unconstitutionality of a statute renders ineffective all remedies and jurisdiction for its enforcement; it generally binds no one, confers no rights, affords no protection, and imposes no duties, and compliance with it is unnecessary.

A ruling that a statute is unconstitutional also affects all the remedies associated with that statute.¹ A court may not properly grant relief based on a statute ruled unconstitutional by a court of last resort whether or not the question has been raised by the parties.² A court has no jurisdiction to try an offense based on a violation of a statute declared to be unconstitutional,³ and it may not entertain jurisdiction over certain proceedings where the statute granting that jurisdiction has been held to be unconstitutional.⁴

An unconstitutional legislative enactment legally binds no one,⁵ creates⁶ or imposes⁷ no obligation, imposes no penalty,⁸ and does not require compliance with it.⁹ No rights are conferred or created by an unconstitutional statute,¹⁰ no rights or immunities may be acquired¹¹ or based on it,¹² and no preexisting right is abrogated.¹³ Furthermore, under a void statute, no protection

is afforded,¹⁴ no office is created,¹⁵ no power or authority is bestowed on anyone,¹⁶ and no duty is imposed.¹⁷ An offense created by such a statute is not a crime.¹⁸ Upon a statute being declared unconstitutional on its face, convictions based thereon are void.¹⁹ These rules apply to any part of an act that is found to be unconstitutional.²⁰ Therefore, if the statute under which an action is brought is unconstitutional, a defendant has a perfectly valid defense.²¹ However, the fact that a statute dealing with punishment for one crime has been declared unconstitutional has no bearing on a case where the defendant was convicted of a similar, but not identical, offense.²²

There are many well recognized exceptions to these general rules.²³ Accordingly, equitable rights may be acquired under a statute even though it is subsequently declared unconstitutional.²⁴ An unconstitutional law should not be applied to work a hardship or impose a liability on one who has acted in good faith and relied on the validity of a statute before the courts have declared it invalid.²⁵ Furthermore, the unconstitutionality of a statute is a bar to liability only when the liability is created by the statute, and the statute's invalidity is not a defense when the liability arises from a voluntary assumption of it by the parties even though they may have acted only because the statute was passed.²⁶

One may not be obligated to repay money granted under a statutory authorization which is held to be unconstitutional.²⁷

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Footnotes

- 1 U.S.—[Payne v. Griffin](#), 51 F. Supp. 588 (M.D. Ga. 1943).
N.M.—[Lucero v. New Mexico State Highway Dept.](#), 1951-NMSC-017, 55 N.M. 157, 228 P.2d 945 (1951).
Tex.—[Lamar Life Ins. Co. v. Jordan](#), 163 S.W.2d 215 (Tex. Civ. App. Waco 1942), writ refused w.o.m., (Sept. 30, 1942).
- 2 Neb.—[Jessen v. Blackard](#), 160 Neb. 557, 71 N.W.2d 100 (1955).
- 3 N.J.—[Ex parte Rose](#), 122 N.J.L. 507, 6 A.2d 388 (N.J. Sup. Ct. 1939).
Okla.—[Brown v. State](#), 55 Okla. Crim. 73, 24 P.2d 1013 (1933).
- 4 Wis.—[In re Bulewicz' Estate](#), 212 Wis. 426, 249 N.W. 534 (1933).
- 5 U.S.—[City of Clinton, Okl., ex rel. Schuetter v. First Nat. Bank in Clinton, Okl.](#), 39 F. Supp. 909 (W.D. Okla. 1941), judgment aff'd, 131 F.2d 978 (C.C.A. 10th Cir. 1942).
Ariz.—[Findlay v. Board of Sup'r's of Mohave County](#), 72 Ariz. 58, 230 P.2d 526, 24 A.L.R.2d 841 (1951).
Fla.—[State ex rel. Fortenberry v. Lee](#), 146 Fla. 383, 1 So. 2d 195 (1941).
Ky.—[Burrow v. Kapfhammer](#), 284 Ky. 753, 145 S.W.2d 1067 (1940).
Neb.—[Mara v. Norman](#), 162 Neb. 845, 77 N.W.2d 569 (1956).
N.H.—[Trustees of Phillips Exeter Academy v. Exeter](#), 90 N.H. 472, 27 A.2d 569 (1940).
- 6 Neb.—[State v. Bardsley](#), 185 Neb. 629, 177 N.W.2d 599 (1970) (overruled in part on other grounds by, [State v. Rosenberger](#), 187 Neb. 726, 193 N.W.2d 769 (1972)).
Tenn.—[State for Use and Benefit of Lawrence County v. Hobbs](#), 194 Tenn. 323, 250 S.W.2d 549 (1952).
Tenn.—[Henry County v. Standard Oil Co.](#), 167 Tenn. 485, 71 S.W.2d 683, 93 A.L.R. 1483 (1934).
- 7 **License fees**
Mont.—[Vaughn & Ragsdale Co. v. State Board of Equalization](#), 109 Mont. 52, 96 P.2d 420 (1939).
- 8 **Contract**
N.C.—[State ex rel. Taylor v. Carolina Racing Ass'n](#), 241 N.C. 80, 84 S.E.2d 390 (1954).
Wis.—[G. Heileman Brewing Co., Inc. v. City of La Crosse, La Crosse County](#), 105 Wis. 2d 152, 312 N.W.2d 875, 25 A.L.R.4th 176 (Ct. App. 1981).
- 9 U.S.—[City of Clinton, Okl., ex rel. Schuetter v. First Nat. Bank in Clinton, Okl.](#), 39 F. Supp. 909 (W.D. Okla. 1941), judgment aff'd, 131 F.2d 978 (C.C.A. 10th Cir. 1942).
Ill.—[Illinois Liquor Control Commission v. Chicago's Last Liquor Store](#), 403 Ill. 578, 88 N.E.2d 15 (1949).
Neb.—[Mara v. Norman](#), 162 Neb. 845, 77 N.W.2d 569 (1956).

Oklahoma.—*State ex rel. Tharel v. Board of Com'rs of Creek County*, 1940 OK 468, 188 Okla. 184, 107 P.2d 542 (1940).

10 U.S.—*Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913).

Cal.—*Bookasta v. Hartford Acc. & Indem. Co.*, 46 Cal. App. 3d 237, 120 Cal. Rptr. 229 (2d Dist. 1975).

Idaho—*Smith v. Costello*, 77 Idaho 205, 290 P.2d 742, 56 A.L.R.2d 1020 (1955).

Ill.—*People v. Zeisler*, 125 Ill. 2d 42, 125 Ill. Dec. 845, 531 N.E.2d 24 (1988).

Ind.—*Ulrich v. Beatty*, 139 Ind. App. 174, 216 N.E.2d 737 (1966).

La.—*In re Standard Homestead Ass'n*, 207 La. 789, 22 So. 2d 119 (1945).

Md.—*Johnson v. State*, 271 Md. 189, 315 A.2d 524 (1974).

Neb.—*Mara v. Norman*, 162 Neb. 845, 77 N.W.2d 569 (1956).

N.M.—*Lucero v. New Mexico State Highway Dept.*, 1951-NMSC-017, 55 N.M. 157, 228 P.2d 945 (1951).

N.C.—*Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

Ohio—*Primes v. Tyler*, 43 Ohio St. 2d 195, 72 Ohio Op. 2d 112, 331 N.E.2d 723 (1975).

S.C.—*Trustees of Wofford College v. Burnett*, 209 S.C. 92, 39 S.E.2d 155 (1946).

Tenn.—*State v. Collins*, 528 S.W.2d 814 (Tenn. 1975).

Tex.—*Newsom v. Starkey*, 572 S.W.2d 29 (Tex. Civ. App. Dallas 1978).

Wash.—*State ex rel. Evans v. Brotherhood of Friends*, 41 Wash. 2d 133, 247 P.2d 787 (1952).

W. Va.—*Morton v. Godfrey L. Cabot, Inc.*, 134 W. Va. 55, 63 S.E.2d 861 (1949).

Wis.—*G. Heileman Brewing Co., Inc. v. City of La Crosse, La Crosse County*, 105 Wis. 2d 152, 312 N.W.2d 875, 25 A.L.R.4th 176 (Ct. App. 1981).

Retention in revisions of statutes

Statutory provisions which became unconstitutional after adoption of a constitutional provision conferred no rights after such adoption, and retention of statutory provisions in subsequent revisions of statutes breathed no life into statutory provisions.

Mo.—*State ex inf. Taylor ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 228 S.W.2d 762 (1950).

Contracts

Ind.—*County Dept. of Public Welfare of Lake County v. American Federation of State, County and Municipal Emp., AFL-CIO, Indiana Council* 62, 416 N.E.2d 153 (Ind. Ct. App. 1981).

Kan.—*State ex rel. Terbovich v. Board of Com'rs of Wyandotte County*, 161 Kan. 700, 171 P.2d 777 (1946).

11 U.S.—*Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913).

Oklahoma.—*Town of Medford ex rel. Fuss v. Early*, 1944 OK 328, 194 Okla. 566, 153 P.2d 633 (1944).

Tex.—*Hufstedler v. Barnett*, 182 S.W.2d 504 (Tex. Civ. App. Amarillo 1944), writ refused w.o.m., (Nov. 29, 1944).

Rights under acts pursuant to statute

The rule that no rights may be acquired under an unconstitutional statute applies to rights acquired under acts performed or executed pursuant to such a statute before a final determination of its unconstitutionality as to those sought to be acquired under acts performed thereafter.

Oklahoma.—*State ex rel. Tharel v. Board of Com'rs of Creek County*, 1940 OK 468, 188 Okla. 184, 107 P.2d 542 (1940).

Disposition of rights acquired under act

Where an act providing for the automatic renewal of leases of school lands was declared unconstitutional, that adjudication disposed of any rights acquired by persons under that act.

Neb.—*Propst v. Board of Educational Lands & Funds*, 156 Neb. 226, 55 N.W.2d 653 (1952).

12 U.S.—*Gary v. Spires*, 473 F. Supp. 878 (D.S.C. 1979).

Ill.—*Grasso v. Kucharski*, 93 Ill. App. 2d 233, 236 N.E.2d 262 (1st Dist. 1968).

Tex.—*Lamar Life Ins. Co. v. Jordan*, 163 S.W.2d 215 (Tex. Civ. App. Waco 1942), writ refused w.o.m., (Sept. 30, 1942).

Ind.—*Ulrich v. Beatty*, 139 Ind. App. 174, 216 N.E.2d 737 (1966).

Neb.—*State v. Clark*, 158 Neb. 570, 64 N.W.2d 112 (1954).

13 U.S.—*Norton v. Shelby County*, 118 U.S. 425, 6 S. Ct. 1121, 30 L. Ed. 178 (1886); *City of Clinton, Okl., ex rel. Schuetter v. First Nat. Bank in Clinton, Okl.*, 39 F. Supp. 909 (W.D. Okla. 1941), judgment aff'd, 131 F.2d 978 (C.C.A. 10th Cir. 1942).

14 Idaho—*Smith v. Costello*, 77 Idaho 205, 290 P.2d 742, 56 A.L.R.2d 1020 (1955).

Ill.—[People v. Zeisler](#), 125 Ill. 2d 42, 125 Ill. Dec. 845, 531 N.E.2d 24 (1988).

Neb.—[Mara v. Norman](#), 162 Neb. 845, 77 N.W.2d 569 (1956).

N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).

Ohio—[Primes v. Tyler](#), 43 Ohio St. 2d 195, 72 Ohio Op. 2d 112, 331 N.E.2d 723 (1975).

Oklahoma—[Town of Medford ex rel. Fuss v. Early](#), 1944 OK 328, 194 Okla. 566, 153 P.2d 633 (1944).

Wash.—[State ex rel. Evans v. Brotherhood of Friends](#), 41 Wash. 2d 133, 247 P.2d 787 (1952).

W. Va.—[Morton v. Godfrey L. Cabot, Inc.](#), 134 W. Va. 55, 63 S.E.2d 861 (1949).

Wis.—[G. Heileman Brewing Co., Inc. v. City of La Crosse, La Crosse County](#), 105 Wis. 2d 152, 312 N.W.2d 875, 25 A.L.R.4th 176 (Ct. App. 1981).

Statute imposing unequal taxes

Oklahoma—[State ex rel. Tharel v. Board of Com'rs of Creek County](#), 1940 OK 468, 188 Okla. 184, 107 P.2d 542 (1940).

15 U.S.—[Norton v. Shelby County](#), 118 U.S. 425, 6 S. Ct. 1121, 30 L. Ed. 178 (1886).

La.—[Bodcaw Lumber Co. of Louisiana v. Jordan](#), 14 So. 2d 98 (La. Ct. App. 2d Cir. 1943).

Neb.—[Jessen v. Blackard](#), 160 Neb. 557, 71 N.W.2d 100 (1955).

N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).

Ohio—[Primes v. Tyler](#), 43 Ohio St. 2d 195, 72 Ohio Op. 2d 112, 331 N.E.2d 723 (1975).

Tenn.—[Farmer v. Wiseman](#), 177 Tenn. 578, 151 S.W.2d 1085, 135 A.L.R. 1169 (1941).

Wash.—[State ex rel. Evans v. Brotherhood of Friends](#), 41 Wash. 2d 133, 247 P.2d 787 (1952).

W. Va.—[Morton v. Godfrey L. Cabot, Inc.](#), 134 W. Va. 55, 63 S.E.2d 861 (1949).

16 N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).

Oklahoma—[Town of Medford ex rel. Fuss v. Early](#), 1944 OK 328, 194 Okla. 566, 153 P.2d 633 (1944).

Tex.—[Newsom v. Starkey](#), 572 S.W.2d 29 (Tex. Civ. App. Dallas 1978).

17 U.S.—[Norton v. Shelby County](#), 118 U.S. 425, 6 S. Ct. 1121, 30 L. Ed. 178 (1886); [City of Clinton, Okl., ex rel. Schuetter v. First Nat. Bank in Clinton, Okl.](#), 39 F. Supp. 909 (W.D. Okla. 1941), judgment aff'd, 131 F.2d 978 (C.C.A. 10th Cir. 1942).

Ill.—[People v. Zeisler](#), 125 Ill. 2d 42, 125 Ill. Dec. 845, 531 N.E.2d 24 (1988).

Neb.—[Mara v. Norman](#), 162 Neb. 845, 77 N.W.2d 569 (1956).

N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).

Ohio—[Primes v. Tyler](#), 43 Ohio St. 2d 195, 72 Ohio Op. 2d 112, 331 N.E.2d 723 (1975).

S.C.—[Vallentine v. Robinson](#), 188 S.C. 194, 198 S.E. 197 (1938).

Tenn.—[State for Use and Benefit of Lawrence County v. Hobbs](#), 194 Tenn. 323, 250 S.W.2d 549 (1952).

Wash.—[State ex rel. Evans v. Brotherhood of Friends](#), 41 Wash. 2d 133, 247 P.2d 787 (1952).

W. Va.—[Morton v. Godfrey L. Cabot, Inc.](#), 134 W. Va. 55, 63 S.E.2d 861 (1949).

18 U.S.—[Ex parte Siebold](#), 100 U.S. 371, 25 L. Ed. 717, 1879 WL 16559 (1879); [Journigan v. Duffy](#), 552 F.2d 283 (9th Cir. 1977); [McLaurin v. Burnley](#), 279 F. Supp. 220 (N.D. Miss. 1967), judgment aff'd, 401 F.2d 773 (5th Cir. 1968).

Conn.—[State v. Sulman](#), 165 Conn. 556, 339 A.2d 62 (1973).

Mass.—[Essex Theatre Corp. v. Police Commissioner of Boston](#), 365 Mass. 183, 310 N.E.2d 329 (1974).

Mont.—[Ex parte Anderson](#), 125 Mont. 331, 238 P.2d 910 (1951).

Similarity of statutes

Since statutes under which a defendant was prosecuted were virtually identical to statutes declared unconstitutional as violative of the privilege against self-incrimination, the statutes under which the defendant was convicted were also unconstitutional.

U.S.—[Aiken v. U.S.](#), 358 F. Supp. 87 (S.D. N.Y. 1972).

19 Va.—[Saunders v. Com.](#), 62 Va. App. 793, 753 S.E.2d 602 (2014).

20 Neb.—[State v. Clark](#), 158 Neb. 570, 64 N.W.2d 112 (1954).

Habitual criminal statute

Or.—[State v. Cory](#), 204 Or. 235, 282 P.2d 1054 (1955).

- 21 Ga.—[Buchanan v. Heath](#), 210 Ga. 410, 80 S.E.2d 393 (1954).
- 22 Tenn.—[Sharp v. State](#), 513 S.W.2d 189 (Tenn. Crim. App. 1974).
- 23 Del.—[Downs v. Jacobs](#), 272 A.2d 706 (Del. 1970).
- Idaho—[State v. Village of Garden City](#), 74 Idaho 513, 265 P.2d 328 (1953).
- Okla.—[Oklahoma Ed. Ass'n, Inc. v. Nigh](#), 1982 OK 22, 642 P.2d 230, 3 Ed. Law Rep. 182 (Okla. 1982).
- Obligation to come within exception**
- One asserting rights under a void law must come within some established exception to this general rule.
- Okla.—[State ex rel. Tharel v. Board of Com'rs of Creek County](#), 1940 OK 468, 188 Okla. 184, 107 P.2d 542 (1940).
- 24 Tex.—[Wichita County v. Robinson](#), 155 Tex. 1, 276 S.W.2d 509 (1954).
- 25 Ariz.—[Shreve v. Western Coach Corp.](#), 112 Ariz. 215, 540 P.2d 687 (1975).
- Idaho—[State v. Village of Garden City](#), 74 Idaho 513, 265 P.2d 328 (1953).
- N.C.—[Powell v. Duke University, Inc.](#), 18 N.C. App. 736, 197 S.E.2d 910 (1973).
- Okla.—[Oklahoma Ed. Ass'n, Inc. v. Nigh](#), 1982 OK 22, 642 P.2d 230, 3 Ed. Law Rep. 182 (Okla. 1982).
- 26 Pa.—[McLean Coal Co. v. Pittsburgh Terminal Coal Corp.](#), 328 Pa. 250, 195 A. 4 (1937).
- 27 U.S.—[Missouri Utilities Co. v. City of California, Mo.](#), 8 F. Supp. 454 (W.D. Mo. 1934).

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16 C.J.S. Constitutional Law § 269

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

D. Determination of Constitutional Questions

7. Effect of Determination

§ 269. Acts done under unconstitutional statutes

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  1045

Generally, all acts under unconstitutional statutes, other than merely incidental acts, are of no effect.

As a general rule, all acts done under an unconstitutional law are of no effect¹ and are not justified by the statute.² However, it has been held that all acts under a statute later declared unconstitutional are not necessarily void³ and that acts done pursuant to statute may be sustained even though it is subsequently held unconstitutional.⁴ Acts that are merely incidental to an unconstitutional legislative enactment, it seems, may be valid,⁵ and parties may deal with each other on the faith of an unconstitutional statute in such a manner that neither may invoke the aid of the courts to undo their acts.⁶

One engaged in the administration of a statute that has been declared unconstitutional is entitled to compensation from an appropriation for the services described in the statute.⁷

Protection against responsibility.

Reliance on a statute that is subsequently declared unconstitutional does not protect one from civil or criminal responsibility for an act performed in reliance on the statute that would otherwise subject one to liability.⁸ For instance, in the absence of a showing of special circumstances, the withholding of payment by a debtor, in good faith, in reliance on a legislative enactment subsequently held unconstitutional, does not exonerate the debtor's obligation to pay interest accruing after the time the debt is due.⁹

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Footnotes

- 1 U.S.—[In re Merced Irr. Dist.](#), 25 F. Supp. 981 (S.D. Cal. 1939), judgment aff'd, 114 F.2d 654 (C.C.A. 9th Cir. 1940).
 Ariz.—[Ferguson v. Superior Court of Maricopa County](#), 76 Ariz. 31, 258 P.2d 421 (1953).
 Fla.—[Richmond v. Town of Largo](#), 155 Fla. 226, 19 So. 2d 791 (1944).
 Kan.—[State v. Carr](#), 151 Kan. 36, 98 P.2d 393 (1940).
 La.—[Smith v. Lincoln Parish Police Jury](#), 327 So. 2d 641 (La. Ct. App. 2d Cir. 1976).
 N.H.—[Trustees of Phillips Exeter Academy v. Exeter](#), 90 N.H. 472, 27 A.2d 569 (1940).
 Okla.—[Town of Medford ex rel. Fuss v. Early](#), 1944 OK 328, 194 Okla. 566, 153 P.2d 633 (1944).
 Tex.—[Hufstedler v. Barnett](#), 182 S.W.2d 504 (Tex. Civ. App. Amarillo 1944), writ refused w.o.m., (Nov. 29, 1944).
 W. Va.—[Jones v. Columbian Carbon Co.](#), 132 W. Va. 219, 51 S.E.2d 790 (1948).
- Adoption of ordinance pursuant to act**
 Ill.—[People ex rel. Gage v. Village of Wilmette](#), 375 Ill. 420, 31 N.E.2d 774 (1940).
- Conveyance of land**
 La.—[Airey v. Tugwell](#), 197 La. 982, 3 So. 2d 99 (1941).
- Postjudgment garnishment proceeding**
 Ga.—[Williams v. American Finance System, Inc.](#), 141 Ga. App. 642, 234 S.E.2d 182 (1977).
- Rights of citizens**
 Any act affecting rights of citizens and based on unconstitutional law is void.
 Ariz.—[Findlay v. Board of Sup'rs of Mohave County](#), 72 Ariz. 58, 230 P.2d 526, 24 A.L.R.2d 841 (1951).
 N.C.—[Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington](#), 237 N.C. 179, 74 S.E.2d 749 (1953).
 Okla.—[Town of Medford ex rel. Fuss v. Early](#), 1944 OK 328, 194 Okla. 566, 153 P.2d 633 (1944).
 Tex.—[Genzer v. Fillip](#), 134 S.W.2d 730 (Tex. Civ. App. Austin 1939), writ dismissed, judgment correct.
 N.C.—[Powell v. Duke University, Inc.](#), 18 N.C. App. 736, 197 S.E.2d 910 (1973).
 Pa.—[Hepburn v. Hey](#), 345 Pa. 125, 26 A.2d 318 (1942).
- Liability of county for services**
 Ill.—[Hall v. Cook County](#), 359 Ill. 528, 195 N.E. 54 (1935).
 Tenn.—[Capri Adult Cinema v. State](#), 537 S.W.2d 896 (Tenn. 1976).
 Wash.—[State ex rel. Coulter v. Yelle](#), 183 Wash. 691, 49 P.2d 465, 101 A.L.R. 1414 (1935).
 Wash.—[State ex rel. Evans v. Brotherhood of Friends](#), 41 Wash. 2d 133, 247 P.2d 787 (1952).
 Va.—[Morton v. Godfrey L. Cabot, Inc.](#), 134 W. Va. 55, 63 S.E.2d 861 (1949).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

III. Construction, Operation, and Enforcement of Constitutional Provisions

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§ 270. Acts done under unconstitutional statutes—Official acts

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Authorities differ on whether an unconstitutional statute protects acts of officers conducted pursuant to it.

As a general rule, acts of government departments, when declared unconstitutional, cease to be operative or binding.¹ An unconstitutional statute confers no authority on,² and affords no protection to,³ an officer acting pursuant to it. On the other hand, ministerial officers are authorized to treat every act of the legislature as *prima facie valid*⁴ and have been held not liable for any acts committed under an unconstitutional statute because of its unconstitutionality.⁵ Also, the rule that an unconstitutional law is a nullity may not be applied to work a hardship and impose liability on a public officer, who, in performance of an official duty, has acted in good faith in reliance on the validity of a statute before any court has declared it invalid,⁶ but in the absence of these circumstances, an unconstitutional law affords no protection to officers who act under it, and officers may not be punished for refusing to obey such a statute.⁷ Therefore, in proceedings to compel the performance of an official duty, the provisions of an unconstitutional law purporting to dispense with that performance may not be pleaded as a defense.⁸

Footnotes

- 1 U.S.—[Payne v. Griffin](#), 51 F. Supp. 588 (M.D. Ga. 1943).
Ind.—[County Dept. of Public Welfare of Lake County v. American Federation of State, County and Municipal Emp., AFL-CIO, Indiana Council 62](#), 416 N.E.2d 153 (Ind. Ct. App. 1981).
Md.—[Ahlgren v. Cromwell](#), 179 Md. 243, 17 A.2d 134 (1941).
Okla.—[State ex rel. Tharel v. Board of Com'rs of Creek County](#), 1940 OK 468, 188 Okla. 184, 107 P.2d 542 (1940).
Tex.—[Denison v. State](#), 61 S.W.2d 1017 (Tex. Civ. App. Austin 1933), writ refused, 122 Tex. 459, 61 S.W.2d 1022 (1933).
- Effect of curative act**
Cal.—[Barrett v. Brown](#), 26 Cal. 2d 328, 158 P.2d 567 (1945).
- Validating decree**
A validating decree cannot cure acts of administrative boards in violation of the constitution.
Fla.—[Pasco County v. State Board of Administration](#), 156 Fla. 37, 22 So. 2d 387 (1945).
- 2 Ga.—[Dobson v. Brown](#), 225 Ga. 73, 166 S.E.2d 22 (1969).
- Personal property assessment**
A tax commission had no authority to settle a gas company's personal property assessment where the statute under which the commission purported to make the assessment had been held unconstitutional.
Mich.—[Michigan Consol. Gas Co. v. Michigan State Tax Commission](#), 4 Mich. App. 33, 143 N.W.2d 606 (1966).
- Fixing prices**
Where a statute authorizing a milk administrator to fix minimum prices was determined to be an unconstitutional delegation of legislative power, a rule fixing prices was invalid, and a conviction for violating that rule was improper.
Conn.—[State v. Stoddard](#), 126 Conn. 623, 13 A.2d 586 (1940).
3 Ga.—[Dobson v. Brown](#), 225 Ga. 73, 166 S.E.2d 22 (1969).
Idaho—[Smith v. Costello](#), 77 Idaho 205, 290 P.2d 742, 56 A.L.R.2d 1020 (1955).
4 Tenn.—[Bricker v. Sims](#), 195 Tenn. 361, 259 S.W.2d 661 (1953).
- Voidable statute**
The rule that an act is not void, but voidable only, applies when the actions under consideration are those of ministerial officers, taken prior to a judicial determination of the constitutional status of a statute.
Tenn.—[State v. Collins](#), 528 S.W.2d 814 (Tenn. 1975).
5 Tenn.—[Bricker v. Sims](#), 195 Tenn. 361, 259 S.W.2d 661 (1953).
Del.—[Downs v. Jacobs](#), 272 A.2d 706 (Del. 1970).
Idaho—[State v. Village of Garden City](#), 74 Idaho 513, 265 P.2d 328 (1953).
Ill.—[Village of Dolton v. Harms](#), 327 Ill. App. 107, 63 N.E.2d 785 (1st Dist. 1945).
Miss.—[Golden v. Thompson](#), 194 Miss. 241, 11 So. 2d 906 (1943).
N.C.—[Powell v. Duke University, Inc.](#), 18 N.C. App. 736, 197 S.E.2d 910 (1973).
Tenn.—[Bricker v. Sims](#), 195 Tenn. 361, 259 S.W.2d 661 (1953).
Tex.—[Wichita County v. Robinson](#), 155 Tex. 1, 276 S.W.2d 509 (1954).
- Disbursing public money**
S.C.—[O'Shields v. Caldwell](#), 207 S.C. 194, 35 S.E.2d 184 (1945).
- Recovery of compensation paid**
Where a statute imposed additional duties on a tax collector, but erred in fixing the manner of paying compensation, the attorney general found the provision constitutional, and acting in good faith, the collector performed services and the commissioners court paid a part of the compensation, the county was not entitled to recover the compensation paid even though the provision for compensation was later determined to be unconstitutional.
Tex.—[Wichita County v. Robinson](#), 155 Tex. 1, 276 S.W.2d 509 (1954).
7 Utah—[State v. Candland](#), 36 Utah 406, 104 P. 285 (1909).
As to the acts of a de facto officer, see C.J.S., Officers and Public Employees § 467.
- Administrative regulation**
An administrative regulation made in pursuance of an unconstitutional statute is not law.

U.S.—[Payne v. Griffin](#), 51 F. Supp. 588 (M.D. Ga. 1943).

Tax collection

If an officer collects a tax under an unconstitutional statute, the fact that he or she is an officer provides no protection.

Ala.—[Glass v. Prudential Ins. Co. of America](#), 246 Ala. 579, 22 So. 2d 13 (1945).

8

U.S.—[Board of Liquidation v. McComb](#), 92 U.S. 531, 23 L. Ed. 623, 1875 WL 17841 (1875).

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Constitutional Law

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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§ 271. Judgments premised on unconstitutional statutes

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Although some authority holds judgments under unconstitutional statutes void, they are generally considered voidable in the sense that they remain final unless they are properly reopened.

Judgments made pursuant to unconstitutional statutes are, according to some authority, void and should be reversed.¹ Accordingly, convictions under unconstitutional statutes are void.² However, this rule has been limited by some courts to direct attacks,³ and a judgment in a civil action under an unconstitutional statute is not void but merely voidable,⁴ or merely erroneous,⁵ and remains effective until regularly set aside or reversed.⁶ Furthermore, if a judgment becomes final before the statute is declared unconstitutional, it is valid and binding and cannot be disturbed, unless it is void or voidable for some other reason,⁷ at least where the court had jurisdiction to render the particular judgment.⁸ Also, effect will be given to judicial acts done pursuant to a statute subsequently declared unconstitutional in other proceedings where equitable considerations so require for the purpose of doing justice in the circumstances of a given case.⁹ On the other hand, if all the proceedings have not been completed before a statute purporting to give jurisdiction is held unconstitutional, and all the parties are before the court, relief from the proceedings should be granted.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Defendant's prior conviction for Class 4 aggravated unlawful use of a weapon (AUUW), which was based on a statute that was subsequently found to be unconstitutional and void ab initio, could not stand as predicate offense for defendant's conviction for unlawful use of a weapon (UUW) by a felon. S.H.A. [720 ILCS 5/24–1.1\(a\), 5/24–1.6\(a\)\(1\), \(a\)\(3\)\(A\), \(d\)](#). *People v. Richardson*, 2015 IL App (1st) 130203, 395 Ill. Dec. 608, 39 N.E.3d 75 (App. Ct. 1st Dist. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ill.—[Rau v. Village of Warrensburg](#), 302 Ill. App. 37, 23 N.E.2d 371 (3d Dist. 1939).
Ind.—[Dowd v. Grazer](#), 233 Ind. 68, 116 N.E.2d 108 (1953).
Mo.—[Lieber v. Heil](#), 32 S.W.2d 792 (Mo. Ct. App. 1930).
Tex.—[Dismuke v. Reid](#), 188 S.W.2d 255 (Tex. Civ. App. 1945).
Appointment of guardian
Tex.—[Genzer v. Fillip](#), 134 S.W.2d 730 (Tex. Civ. App. Austin 1939), writ dismissed, judgment correct.
2 U.S.—[Ex parte Siebold](#), 100 U.S. 371, 25 L. Ed. 717, 1879 WL 16559 (1879).
Ill.—[People v. Eisen](#), 357 Ill. 105, 191 N.E. 219 (1934).
Mont.—[Ex parte Anderson](#), 125 Mont. 331, 238 P.2d 910 (1951).
S.D.—[State v. Dove](#), 75 S.D. 460, 67 N.W.2d 917 (1955).
Tex.—[Snyder v. State](#), 123 Tex. Crim. 104, 57 S.W.2d 855 (1933).
3 Iowa—[New York Life Ins. Co. v. Breen](#), 227 Iowa 738, 289 N.W. 16 (1939).
4 Iowa—[New York Life Ins. Co. v. Breen](#), 227 Iowa 738, 289 N.W. 16 (1939).
Oklahoma—[Fitzsimmons v. City of Oklahoma City](#), 1942 OK 422, 192 Okla. 248, 135 P.2d 340 (1942).
5 Tex.—[Commonwealth of Massachusetts v. Davis](#), 140 Tex. 398, 168 S.W.2d 216 (1942).
Ky.—[Charos v. Jent](#), 293 Ky. 50, 168 S.W.2d 334 (1943).
6 Iowa—[New York Life Ins. Co. v. Breen](#), 227 Iowa 738, 289 N.W. 16 (1939).
As to a judgment under an unconstitutional statute being res judicata, see [C.J.S., Judgments](#) § 950.
Final upon failure to appeal
Wis.—[In re Trustees of Milwaukee County Orphans' Bd.](#), 218 Wis. 518, 261 N.W. 676 (1935).
7 U.S.—[National Life & Acc. Ins. Co. v. Parkinson](#), 136 F.2d 506 (C.C.A. 10th Cir. 1943).
Ind.—[Dowd v. Grazer](#), 233 Ind. 68, 116 N.E.2d 108 (1953).
Neb.—[Davis Management, Inc. v. Sanitary and Imp. Dist. No. 276 of Douglas County](#), 204 Neb. 316, 282 N.W.2d 576 (1979).
Oklahoma—[Fitzsimmons v. City of Oklahoma City](#), 1942 OK 422, 192 Okla. 248, 135 P.2d 340 (1942).
Pa.—[Tradesmens Nat. Bank & Trust Co. v. Floyd](#), 156 Pa. Super. 141, 39 A.2d 728 (1944).
Order refunding bail
Bail money refunded to a surety, under a court order based on a statute declared unconstitutional over one year after the order was made, was not recoverable by the county since the order had the force of a final judgment satisfied by payment.
Cal.—[Los Angeles County v. Seaboard Sur. Corp. of America](#), 139 Cal. App. 497, 34 P.2d 191 (3d Dist. 1934).
8 Fla.—[In re Newkirk](#), 114 Fla. 552, 154 So. 323 (1934).
Statute conferring jurisdiction
A decision that a statute conferring civil jurisdiction is unconstitutional will not be given retroactive effect.
Oklahoma—[Hanchett Bond Co. v. Morris](#), 1930 OK 219, 143 Okla. 110, 287 P. 1025 (1930).

9 Pa.—[Hepburn v. Hey](#), 345 Pa. 125, 26 A.2d 318 (1942).

10 Okla.—[Hanchett Bond Co. v. Morris](#), 1930 OK 219, 143 Okla. 110, 287 P. 1025 (1930).

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